Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1993

No.

PSI ENERGY, INC.,

Petitioner,

vs.

EXXON COAL USA, INC. and EXXON CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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104 pp

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Seventh Circuit erred by failing to adhere to the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure, and acted in conflict with the decisions of this Court by improperly rejecting the findings of fact, including findings assessing the credibility of witnesses, issued by the district court in a contract renegotiation dispute.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, PSI Energy, Inc. ("PSI")[1] respectfully urges this Court to issue a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") issued in cause number 93-3191 on February 22, 1994, which reversed the decision of the United States District Court for the Southern District of Indiana, Indianapolis Division ("District Court") entered on August 27, 1993.[2]

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[1] PSI is a wholly-owned subsidiary of PSI Resources, Inc. ("Resources"), and PSI does not have any subsidiaries which are not wholly-owned by PSI. Resources is in the process of combining in a merger transaction with The Cincinnati Gas & Electric Company to form a new company named CINergy Corp.

[2] The names of all parties are listed in the caption herein.

OPINIONS BELOW

The opinion of the Seventh Circuit issued on February 22, 1994, has not been officially reported. A copy of that opinion may be found in the Appendix attached hereto at page A-1 ("App. __"). PSI's Petition for Rehearing With a Suggestion for Rehearing En Banc was denied by the Seventh Circuit on March 21, 1994. App. 12.

The decision of the District Court which gave rise to the appeal to the Seventh Circuit was issued on August 27, 1993, has been officially reported at 831 F. Supp. 1430 (S.D. Ind. 1993), and may be found at App. 13.

Earlier decisions by the District Court and the Seventh Circuit in this matter are 831 F. Supp. 1419 (S.D. Ind. 1992), App. 58 *reversed and remanded* 991 F. 2d 1265 (7th Cir. 1993), App. 37, petitions for rehearing denied 1993 U.S. App. LEXIS 11734 (7th Cir. May 20, 1993), App. 50. In response to a Motion for Recall and Clarification of Mandate filed by the Respondents ("Exxon") following the Seventh Circuit's 1993 Decision, the Seventh Circuit issued an Order dated July 12, 1993. App. 51.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and Rule 10 of the Rules of this Court to review an opinion of the Seventh Circuit issued in contravention to Rule 52 of the Federal Rules of Civil Procedure, 28 U.S.C., and applicable decisions of this Court. The opinion of the Seventh Circuit was issued on February 22, 1994, and a Petition for Rehearing with a Suggestion for Rehearing En Banc was denied on March 21, 1994. This Petition is timely in that it is filed prior to the expiration of the ninety-day period allowed by 28 U.S.C. §2101(c) and Rule 13 of the Rules of this Court.

STATUTORY PROVISIONS INVOLVED

Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C., provides, in part, as follows:

> Effect. In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . .

STATEMENT OF THE CASE

This Petition arises from a decision of the Seventh Circuit involving a price reopener provision of a long-term coal supply agreement between the parties and the renegotiations related thereto ("Reopener"). That decision reversed a decision of the District Court issued on remand from the Seventh Circuit.

I. Course of Proceedings Below

PSI filed for a declaratory judgment against Exxon on May 15, 1992, seeking to have the District Court determine that an offer PSI had received for the supply of coal to PSI by a third party was a "competitive offer" pursuant to §7.03 of the Coal Supply and Purchase Agreement entered into by the parties on April 26, 1974 ("Agreement"). On December 28, 1992, the District Court issued its decision granting PSI's request for declaratory relief, holding that the third party offer was a "competitive offer," that Exxon had failed to meet that offer as allowed by the Agreement, and that the Agreement would terminate by its terms on December 31, 1992. App. 79.

Exxon filed an appeal to the Seventh Circuit, and on April 15, 1993, that Court reversed the District Court, holding that the third party offer was not a "competitive offer" because it contained a multi-mine bid which made the calculation of a single delivered price difficult, and that Exxon was only required to match a single delivered price. App. 47-49. The Seventh Circuit remanded the case to the District Court to "consider argu-

ments it had bypassed in light of its conclusion that Black Beauty's offer was 'competitive' and that Exxon had not met it." 991 F.2d 1265; App. 49. Specifically, the Seventh Circuit instructed the District Court to consider PSI's arguments that Exxon had not negotiated with PSI in good faith as required by the Agreement and that Exxon's "last offer" during the negotiations lacked material terms, which prohibited PSI from determining the actual price Exxon was offering. *Id.*

PSI interpreted the Seventh Circuit's opinion to mean that if Exxon had not met its contractual requirement to negotiate with PSI in good faith the Agreement would still be terminated. Upon Exxon's Motion for Recall and Clarification of the Mandate, the Seventh Circuit issued an order on July 12, 1993, App. 51, which provided that:

> The language in the opinion was designed to focus the attention of the parties and the district judge on a *single ultimate question: what price will be effective as the Base until the next reopening*? Whether the contract itself remains in force is an issue the panel fully considered and resolved. We wrote: "Under § 7.03 [of the contract] the parties must proceed during 1993-97 using Exxon's 'last offer'." Exxon's bid of $30 per ton might be deemed not the "last offer" either because Exxon acted in bad faith in making that bid or because its offer omitted material terms; in either event $23.266 would become the "last offer."

(Emphasis supplied)

Following the remand hearing, the District Court issued its Entry, containing findings of facts and conclusions of law, and Supplement to Final Judgment Entered Pursuant to Order of Remand. In that Entry, the District Court made findings, with appropriate references to the evidence, regarding the oral and documentary evidence and the credibility of witnesses, and concluded that Exxon had not negotiated in good faith with PSI; that Exxon's $30 per ton offer omitted material terms; and that Exxon's "last offer" was, therefore, in accordance with the

Seventh Circuit's July 12, 1993, Order, $23.266 per ton. 831 F. Supp., at 1440; App. 31-32.

Exxon appealed the District Court's decision, and on February 22, 1994, the Seventh Circuit again reversed the District Court, holding that the District Court's findings on lack of material terms were "unexceptionable," but as a construction of the contract were incorrect; that the findings of a lack of good faith were clearly erroneous; and that the price for the coal should be $30 per ton.

II. Facts Material to the Issue Presented for Review

Article VII of the Agreement provides that the parties may renegotiate the base price and the price adjustment factors ("Exhibit A") at five-year intervals. District Court's Finding of Fact 8 ("FOF __"); App. 21. Each five-year period between renegotiations is called a "Contract Period." Id. If renegotiation is requested, §7.03 of the Agreement requires each party to negotiate "in a good faith effort to reach agreement." *Id.* If an agreement cannot be reached, PSI "will accept [Exxon's] last offer or present [Exxon] with a firm, written offer which it has received from another supplier, which it is willing to accept." *Id.* Exxon has the right to meet that competitive offer. *Id.*

The coal Exxon is supplying to PSI under the Agreement is classified as "high sulfur coal." FOF 23; App. 26. In 1990, Congress passed amendments to the Clean Air Act, 42 U.S.C. §7651d, which affected the ability of PSI and other electric utilities to burn high sulfur coal. The amendments progressively reduce the amount of sulfur dioxide utilities may emit. FOF 27; App. 26. As the cost to utilities of burning high sulfur coal has increased, the market value of high sulfur coal has decreased significantly. FOF 28; App. 26. During 1991-1992, the market price for high-sulfur coal similar to Exxon's was approximately $17 to $20 per ton. FOF 29; App. 27.

The District Court found that the primary purpose of Article VII is to manage market risk, and that the Reopener "allows

the parties to reconcile deviations in the contract price with the prevailing market price." FOF 9; App. 23. At the time of the Reopener, the price of Exxon's coal had escalated through the Exhibit A adjustments from the 1974 base price of $11.017 per ton to $38.13 per ton. PSI Exhibit 249. However, when Exxon entered into the Reopener, it "knew that the market price for its coal at the Monterey No. 2 Mine was approximately $20 per ton. The evidence of this fact is abundant." FOF 32; App. 27.

The District Court further found that:

> The uncontroverted documentary evidence from Exxon's own files establishes that they were operating on a factual basis with respect to the market value of the coal from the Monterey No. 2 Mine which they consistently misrepresented in their dealings with PSI.

FOF 33; App. 28, and that:

> . . . [d]espite what it knew about the market price for coal from the Monterey No. 2 Mine, Exxon repeatedly advised PSI that the market would support a price in excess of $30 delivered to [PSI's] Gibson [Generating] Station. *See* Veenstra Testimony, Hearing Tr., at 60-61; Veenstra Testimony, Trial Tr., at 68-70; Veenstra Testimony, Trial Tr., at 134-135, 136; Veenstra Testimony, Trial Tr., at 191-192, 200.

FOF 34; App. 28.

The District Court found that "Exxon's representations to PSI regarding the market price of its coal were knowingly and intentionally inaccurate." FOF 35; App. 28. The District Court also found that:

> The testimony of Wendell Ellis [Exxon's principal negotiator] was in critical respects evasive and deceptive. For instance, when asked whether Exxon expected the market price for coal from the Monterey No. 2 Mine to be approximately $17-$20 per ton at the start of the next contract period, his response was: "*I would not say it [i.e. the price of $17 to $20 per ton] represented what we expected it to be*; it represented what it could possibly be."

> Ellis Testimony, Hearing Tr., at 151 *(emphasis added).* Contrary to this representation by Mr. Ellis to the Court, there is no doubt from the documentary evidence created before and during these negotiations and discussions with PSI, *supra*, that Exxon fully expected the price of coal from the Monterey No. 2 Mine to be approximately $20 at the mine, *supra. The Court is unable to afford much credibility to the testimony of Mr. Ellis.*

FOF 36; App. 28 *(Emphasis supplied).*

The base price and Exhibit A cumulatively define the price of the coal under the Agreement. FOF 39; App. 29. It is impossible to calculate the price without an accompanying Exhibit A. FOF 40; App. 29. Because Exxon refused or failed to provide a proposed Exhibit A to PSI, PSI was unable to calculate the price for Exxon's coal for the next Contract Period from Exxon's $30 per ton offer. FOF 41; App. 29. Section 7.05 of the Agreement specifically requires that the parties renegotiate Exhibit A, FOF 42; App. 30, but Exxon "steadfastly refused to discuss the terms of Exhibit A." FOF 43; App. 30.

The District Court further found that:

> In an Exhibit A attached to Exxon's previous offer of $29.60, Exxon did not incorporate a "reference date of January 1, 1993, but pegged the escalation to commence on December 1, 1991, or 13 months prior to the start of the next contract period. *See* Veenstra Testimony, Trial Tr., at 61. As Mr. Veenstra explained to Mr. Ellis, "[w]ithout a firm Base price effective January 1, 1993, it will be difficult for us to solicit and compare potential competitive offers. We believe that an offer of a firm Base price referenced and effective January 1, 1993, is what is intended by Article VII of the Agreement, and we repeat our request to be provided with this number."

FOF 44; App. 30.

The District Court determined the testimony of PSI's chief negotiator, Robert Veenstra, "relating to the details of these negotiations with Exxon to be highly credible." FOF 45; App. 30.

III. Basis for Jurisdiction in the District Court

Jurisdiction in the District Court was pursuant to 28 U.S.C. §1332(a)(1). Plaintiff PSI is an Indiana corporation, having its principal place of business in Plainfield, Indiana. FOF 1; App. 20. Defendant Exxon Corporation is a New Jersey corporation, having its principal place of business in a state other than Indiana; and Defendant Exxon Coal USA, Inc., a subsidiary of Exxon Corporation, is a Delaware corporation, having its principal place of business in a state other than Indiana. FOF 2; App. 20. The amount in controversy exceeded the sum of $50,000. FOF 3; App. 20.

REASONS FOR THE ALLOWANCE OF THE WRIT

In reversing the decision of the District Court relating to Exxon's lack of good faith in negotiations and its omission of material terms from its "last offer," the Seventh Circuit failed to adhere to the principles established by this Court regarding the clearly erroneous standard of Rule 52(a).

I. Exxon did not negotiate with PSI in good faith

Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C., provides, in part, that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." In *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573 (1985), citing *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949), this Court stated as follows:

> . . . If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.* . . .

(Emphasis supplied)

In that decision, this Court also directed the courts of appeals not to substitute their judgments for those of the district courts, unless all of the evidence leads to the conclusion that a mistake has been committed. However:

> . . . [t]his standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. *"In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo." Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). . . .

Anderson v. City of Bessemer City, supra, 470 U.S., at 573. *(Emphasis supplied)*

In the case at bar, the parties were involved in a contract renegotiation relating to the price of high-sulfur coal Exxon was selling to PSI under a long-term coal supply agreement. The Reopener provision of that Agreement provides in §7.03 for notice to be issued by either party to the other party if there is a desire to renegotiate the price. That notice must be given within the first 30 days of the fourth year of any Contract Period, and the parties then have at least 17 months in which to attempt to renegotiate the price. FOF 8; App. 21. PSI commenced that process in January, 1991, and in April, 1992, the parties agreed that their positions had become polarized and that PSI should submit a competitive offer to Exxon. FOF 13; App. 24.

The District Court correctly found that during that 16 month period of renegotiations, Exxon's offers to PSI were continually escalating. Exxon made an offer to PSI on July 17, 1991, to sell its coal to PSI at $20.10 per ton plus freight. FOF 12; App. 24. On November 26, 1991, Exxon increased that offer to $25 per ton at the mine. Id. On December 3, 1991, Exxon

provided PSI a delivered price of $29.60 per ton. Id. On April 28, 1992, Exxon presented PSI with its "last offer" of $30 per ton. However, in response to the competitive offer PSI obtained, Exxon submitted a conditional offer to PSI on July 1, 1992, of $23.266 per ton. FOF 19; App. 25.

When Exxon entered into renegotiations with PSI, Exxon knew that the market price for its coal was approximately $20 per ton. As the District Court found:

> [t]he evidence of this fact is abundant. *See, e.g.*, Plaintiffs Exhibit 203, at 3 ("Our current mine price to PSI is about $32/ton. *PSI believes it can purchase coal for an equivalent of about $20/ton at No. 2 Mine.* Thus, PSI expects to dramatically lower its prices for the 5-year period starting in 1993. *We believe PSI's assessment is in the right range.*"); Plaintiffs Exhibit 202, Appendix B, at 3 ("*The sales price* is subject to renegotiation effective 1/1/93 and *is expected to drop significantly at that time as it approaches a level closer to market. The sales price expected at that time ($20.50/ton)* is slightly less than current operating costs ($23/ton YTD July 1990)."; . . . .

FOF 32; App. 27 *(Emphasis supplied).*

The District Court also found that "[t]he uncontroverted documentary evidence from Exxon's own files establishes that they were operating on a factual basis with respect to the market value of the coal from the Monterey No. 2 Mine which they consistently misrepresented in their dealings with PSI. . . ." FOF 33; App. 28. "Despite what it knew about the market price for coal from the Monterey No. 2 Mine, Exxon repeatedly advised PSI that the market would support a price in excess of $30 delivered to the Gibson Station." FOF 34; App.28. Based upon all of the evidence the District Court cited in support of those two findings, [*See*, App. 28], and the testimony of the witnesses at trial, the District Court issued finding 35: "Thus, Exxon's representations to PSI regarding the market price of its coal were knowingly and intentionally inaccurate." App. 28.

In Conclusion of Law 6, the District Court held that Exxon did not negotiate in good faith with PSI, and that Exxon had deviated from the "honesty in fact" requirement of the Indiana Uniform Commercial Code, I.C. 26-1-2-103(B). The Seventh Circuit determined that this Conclusion "is a factual finding, so our review is deferential. *Anderson v. Bessemer City*, 470 U.S. 564 (1985). We conclude, however, that the finding is clearly erroneous." App. 31. In reaching its conclusion, the Seventh Circuit ignored all of the exhibits and testimony cited by the District Court, stating as follows:

> . . . Exxon's bad faith lay, in other words, in lying to PSI about the market price for coal. . . The antecedent problem, however, is that the portions of the record the district court cited offer no support for the conclusion that Exxon told a lie.
>
> All of the district court's references are to testimony concerning four pages of price data Exxon's negotiating team handed to PSI's team . . . *PSI has never suggested, and the district court did not find, that Exxon doctored the data to make the average price look higher, or even that it selected high-price contracts for inclusion while omitting lower-price contracts. . . .*

App. 8.

On the contrary, that is precisely what PSI contended, both at trial and in its Brief on appeal to the Seventh Circuit, and what the District Court held. Those "four pages of price data," which were represented by Exxon to PSI as support for a price of over $31 per ton for its coal, were admitted into evidence as Exxon's Exhibit 205. Seth Schwartz, PSI's "expert on fuel contracts and pricing," FOF 16, App. 25, testified at the remand hearing that the "four pages of price data" were not an honest representation of the market price for Exxon's coal:

> There are four major flaws to this chart as to why it does not reflect the market price for Monterey's coal.
>
> Probably the first and foremost is that it showed the delivered prices of the existing contracts at the time with-

> out regard to the date of those contracts and when the price was set. *As a result, these delivered prices do not reflect the current market price at the time that it was offered, but rather reflect the market price over a variety of periods of time, including many high priced old contracts just like Exxon's old contract with PSI.*
>
> Secondly, *the presentation of data on this exhibit is selective and biased. The exhibit excludes many other long-term contracts for the same coal as described under this exhibit that had lower prices that were not included in this analysis.*
>
> Third, the exhibit is not selective as to the coal quality at issue here. Specifically, *numerous contracts on this exhibit are for low-sulfur coal, which carries a much higher market price than the coal called for under the [Agreement].*
>
> And fourth and finally, the prices shown here are delivered prices to a wide variety of utilities and power plants, including many with much higher transportation costs than would be appropriate for the delivered price analysis to the Gibson power plant, and as a result it's a false presentation of what an average delivered price would be to the Gibson power plant in these contracts.

Hearing on Remand Transcript, July 28, 1993, pp. 22-25, App. 82.

PSI would submit that the District Court's findings are clearly correct relating to Exxon's lack of good faith and lack of honesty in fact, and should have been affirmed. However, when there are two permissible views of the evidence, the District Court's "choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City, supra*, 470 U.S., at 574. Thus, the Seventh Circuit's attempt to show that its view of the facts was correct, even though in direct conflict with the District Court's analysis, must be rejected by this Court. Accordingly, this Court should grant the Writ to review and correct the Seventh Circuit's failure to give appropriate defer-

ence to the District Court's findings of fact as required by Rule 52(a) of the Federal Rules of Civil Procedure.

II. Exxon's "last offer" omitted material terms that precluded PSI from determining the price of Exxon's coal at the beginning of the next Contract Period.

As stated above, Exxon's offers to PSI were continually escalating. Exxon's initial offer was $20.10 per ton plus freight, which, four months later was increased to $25 per ton at the mine. Shortly thereafter, Exxon provided PSI a delivered price of $29.60 per ton, and on April 28, 1992, Exxon presented PSI with its "last offer" of $30 per ton. However, in response to the competitive offer PSI obtained, Exxon submitted a conditional offer of $23.266 per ton.

The District Court found that Exxon only supplied PSI with an Exhibit A for the $29.60 offer, and that Exhibit A had a reference date of December 1, 1991, 13 months prior to the start of the next Contract Period. FOF 44; App. 30. That early reference date made it difficult for PSI to solicit and compare potential competitive offers. *Id.* Exxon's "last offer" of $30 per ton did not include an Exhibit A. FOF 43; App. 30.

Based upon the testimony of Robert Veenstra, PSI's principal negotiator; Seth Schwartz; and Andrew Twadelle, Exxon's former employee charged with administering the Agreement, the District Court found that "PSI was unable to calculate a Price for Exxon's coal on or after January 1, 1993, from Exxon's $30 per ton offer." FOF 41; App. 29. This inability arose "[b]ecause Exxon refused or failed to provide a proposed Exhibit A to PSI." *Id.*

Contrary to this Court's directions in *Anderson v. City of Bessemer City, supra*, 470 U.S., at 573, and *Zenith Radio Corporation v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969), the Seventh Circuit, after agreeing that the District Court's findings on Exxon's failure to provide an Exhibit A and the inability of PSI to determine the January 1, 1993 price were

"unexceptionable," tried to convert those findings into a construction of the Agreement, which, it opined, would thereby allow it to exercise plenary review. The Seventh Circuit stated as follows:

> . . . The [$30] offer did not include a copy of the Exhibit A that would be effective on that date [January1,1993], but Exxon promised to update its figures: "The new Base of $30.00 per ton would be subject to adjustments in union welfare, taxes/fees and new laws/regulations between May 1, 1992 and the revised reference date of January 1, 1993." In other words, . . . changes in taxes and union welfare funds (plus the costs of new laws) from May through December 1992 would lead to adjustments under Exhibit A. The *structure* of Exhibit A would remain the same, but the figures would be updated as of January 1 (or May 1) so that only changes after those dates would alter the delivered price of coal. *(Emphasis in the original)* The offer does not state a price per ton as of January 1, 1993, but it provides the formulas from which the price could be computed once that date arrived. . .
>
> . . . the parties must update Exhibit A to reflect economic conditions on the date the new Base takes effect. In effect, the Base is the Price at the start of the new contract period; any later change in one of the 12 categories covered by Exhibit A will lead to an adjustment in the Price. Exxon's offer in April 1992 conformed to this approach, *with the proviso that Exxon wanted to make adjustments* for changes "in union welfare, taxes/fees and new laws/regulations between May 1, 1992 and the revised reference date of January 1, 1993." Exxon offered a Base of $30; *PSI's inability to convert this into a Price as of January 1, 1993, until seeing what happened to the three open categories between May and December is neither here nor there under the contract.*

App. 4-5; *(Emphasis supplied)*

Therefore, even though PSI would not know in January, 1993, how much it would be paying for Exxon's coal, the Seventh Circuit held that the District Court's finding that Exxon's

last offer lacked material terms was incorrect.[3] In so holding, the Seventh Circuit ignored the applicable decisions of this Court noted above and decisions it had previously issued. *See, e.g., Castellano v. Marion Partners*, 960 F.2d 636, 638 (7th Cir. 1992) ("even if the trial court's findings were *mixed* findings of law and fact, the clearly erroneous standard would nonetheless apply to this court's review.") *(Emphasis in the original).*

CONCLUSION

The District Court conducted two trials relating to the Reopener, reviewed hundreds of exhibits, listened to the testimony of several witnesses, assessed the credibility of the oral and written evidence and of the witnesses, and issued extensive findings of fact adequately supported by record citations. Those findings are not to be overturned on appeal unless they are clearly erroneous. Nevertheless, the Seventh Circuit ignored those findings, considered the matter *de novo*, and substituted its judgment for that of the District Court. That clear error by the Seventh Circuit should be reversed by this Court.

Therefore, for these reasons, a Writ of Certiorari should be issued to review the decision of the Seventh Circuit.

Respectfully submitted,

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[3] Pursuant to the Agreement, PSI is to purchase three million tons of coal from Exxon each year for the next five years. At a difference of nearly seven dollars per ton between the District Court's price of $23.266 and the Seventh Circuit's price of $30, the impact of the Seventh Circuit's decision is over $100 million.

Appendix

In The

United States Court of Appeals

For the Seventh Circuit

No. 93-3191

PSI ENERGY, INC.,

Plaintiff-Appellee,

v.

EXXON COAL USA, INC., and EXXON CORPORATION,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. IP92 645-C—**Sarah Evans Barker,** *Chief Judge.*

SUBMITTED JANUARY 3, 1994*—DECIDED FEBRUARY 22, 1994

Before BAUER, REAVLEY,** and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Our prior opinion, 991 F.2d 1265 (1993), held that the long-term coal contract between PSI Energy and Exxon Coal USA remains in effect. We remanded so that the district judge could determine the Base price of coal for the period 1993-97. Under the contract, Exxon's "last offer" sets the price for that period. According to Exxon, the "last offer" was a Base of $30 per ton. According to PSI, the $30 offer

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* An earlier appeal was argued on March 31, 1993, to this panel, which has unanimously decided that further oral argument is unnecessary.

** Hon. Thomas M. Reavley, of the Fifth Circuit, sitting by designation.

was incomplete and made in bad faith, and Exxon's bid of $23.266 per ton, matching a rival's proposal in the event it qualified as a "competitive offer" under the contract (which, we held, it did not), is the only suitable "last offer." The district court took additional evidence and held not only that Exxon had negotiated in bad faith but also that its $30 bid omitted essential terms. 831 F. Supp. 1430 (S.D. Ind. 1993). As a result, the court held, the Base during 1993-97 is $23.266 per ton.

PSI raises a jurisdictional question. After January 1, 1993, PSI began accepting deliveries from Black Beauty Coal Company, believing that Exxon's failure to match Black Beauty's offer brought their contract to an end. Not until July 1993, three months after our opinion held that the PSI-Exxon contract remains in force, did PSI resume taking deliveries from Exxon. We issued a supplemental order on July 12, 1993, clarifying the issues to be resolved on remand; this order suggested that the proceedings should include a determination of the damages PSI owes for failure to accept Exxon's coal. The district court did not assess damages on remand, which, PSI believes, makes the order non-final. Cf. *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976). When issuing the order of July 12 we were unaware, however, that Exxon had commenced a separate action seeking damages. The district court has wrapped up all of the issues actually presented by this suit, and its decision is appealable.

The contract between PSI and Exxon provides for price renegotiation every five years. If the parties do not reach agreement, the price is set in one of two ways: either Exxon's "last offer" prevails during the ensuing five years, or PSI obtains a "competitive offer," which Exxon may match. If it elects not to match the rival's bid, then the rival gets the business (although PSI may require Exxon to supply coal for an additional two years, while the rival prepares to perform). Sections 7.03 and 7.05 of the contract describe the mechanism:

> [§7.03] Either party may require renegotiation of the Base by giving to the other, at any time in the first thirty

(30) days of the fourth year of any contract period . . ., written notice of its desire to do so. Promptly after the giving of such notice, the parties will commence negotiations to agree upon a new Base to be effective as of commencement of the next contract period. Each party covenants with the other to participate in such negotiations in a good faith effort to reach agreement. If the parties are unable to reach agreement, BUYER will accept SELLER's last offer or present SELLER with a firm, written offer which it has received from another supplier, which it is willing to accept, for the supply of coal called for under the remaining term of this Agreement (herein referred to as a "competitive offer"). It shall also provide SELLER with documentary proof of such offer, and permit SELLER to examine all supporting data and information submitted with the offer. SELLER shall have the right to meet such competitive offer.

If, by the one hundred and eightieth day preceding the end of the contract period in which notice of price renegotiation was given, the parties have agreed upon a new Base, appropriate changes shall be made to the adjustment factors provided in Exhibit "A". The Price of coal effective at the commencement of the next contract period shall be computed from the new Base adjusted under the provisions of Exhibit "A" from the reference date of the new Base. If, by such time, the parties have not reached agreement upon a new Base and SELLER declines to meet a competitive offer submitted by BUYER pursuant to the above provisions, this Agreement shall terminate at the end of the contract period in which notice of price negotiation was given, or at BUYER's election, at the end of the temporary continuance of deliveries as provided for in Section 7.04.

[§7.05] It is understood and agreed that the purpose and intent of Sections 7.01 to 7.04, inclusive, are only to provide for renegotiation of Base and Exhibit "A", and neither party shall inject into such negotiations, as a condition of agreement upon a new Price for the coal, any

> demand or request that other terms and conditions of this Agreement be altered.

"Base" is the negotiated figure; "Exhibit A" describes adjustments to be made while a Base remains in force. Exhibit A specifies the effects of 12 fluctuating factors, including labor costs, taxes, freight, and changes in the value of money.

After the parties reached a stalemate in April 1992, PSI asked Exxon to make a formal "last offer" within the meaning of §7.03. Exxon offered a Base of $30 per ton, F.O.B. PSI's Gibson generating station, effective January 1, 1993. The offer did not include a copy of the Exhibit A that would be effective on that date, but Exxon promised to update its figures: "The new Base of $30.00 per ton would be subject to adjustments in union welfare, taxes/fees and new laws/regulations between May 1, 1992 and the revised reference date of January 1, 1993." In other words, Exxon would absorb any increases in wages, freight, and the cost of living between April 1992 and January 1993, but changes in taxes and union welfare funds (plus the costs of new laws) from May through December 1992 would lead to adjustments under Exhibit A. The *structure* of Exhibit A would remain the same, but the figures would be updated as of January 1 (or May 1) so that only changes after those dates would alter the delivered price of coal. The offer does not state a price per ton as of January 1, 1993, but it provides the formulas from which the price could be computed once that date arrived. The district court concluded that this combination of a $30 Base plus a promise to update the table of adjustments is not a proper "last offer" under the contract because "[i]t is not possible to calculate the Price under the Contract without an accompanying Exhibit A." 831 F. Supp. at 1438. As a finding of fact — that only Base and Exhibit A put together yield a dollar price — this is unexceptionable. As a construction of the contract, a subject on which our review is plenary (given the parties' agreement that the contract is not ambiguous), it is incorrect.

Section 7.03 does not call for the parties to renegotiate the Price (a defined term, starting with Base and including adjust-

ments per Exhibit A and several other portions of the contract). It provides, instead, that if either party gives the appropriate notice, "the parties will commence negotiations to agree upon a new Base to be effective as of commencement of the next contract period." Section 7.03 adds that once the parties agree on a new Base, "appropriate changes shall be made to the adjustment factors provided in Exhibit 'A'." Although the contract does not say what "appropriate changes" are, the context furnishes the explanation: the parties must update Exhibit A to reflect economic conditions on the date the new Base takes effect. In effect, the Base is the Price at the start of the new contract period; any later change in one of the 12 categories covered by Exhibit A will lead to an adjustment in the Price. Exxon's offer in April 1992 conformed to this approach, with the proviso that Exxon wanted to make adjustments for changes "in union welfare, taxes/fees and new laws/regulations between May 1, 1992 and the revised reference date of January 1, 1993." Exxon offered a Base of $30; PSI's inability to convert this into a Price as of January 1, 1993, until seeing what happened to the three open categories between May and December is neither here nor there under the contract.

Things would have been more complicated had the parties been negotiating some of the formulas in Exhibit A. Although §7.03 speaks of renegotiating Base, §7.05 says that "the purpose and intent of Sections 7.01 to 7.04, inclusive, are only to provide for renegotiation of Base and Exhibit 'A'". We may assume, therefore, that PSI was entitled to put on the table a proposal to alter the extent to which Exhibit A translates changes in Exxon's costs into changes in the Price. For example, Part 2 of Exhibit A provides that whenever an adjustment is made under Part 1 for changes in labor costs, "an additional adjustment in the amount of fifty percent (50%) of the adjustment so made, shall be made effective on the same date for changes in the cost of administrative, supervisory, technical, and clerical help at the mine and for changes in SELLER's allocated administrative costs." PSI might have proposed

changing this figure to 25% or abolishing it altogether. Then Exxon's offer of a $30 Base plus an Exhibit A updated to January 1, 1993, could have been ambiguous. Did it include PSI's desired change or not? Yet the parties were not negotiating the structure of Exhibit A: Exxon had made it clear that it viewed the subject as non-negotiable, and PSI had not made any concrete proposal concerning the text and structure of Exhibit A. Exxon's offer of April 1992 set a firm Base of $30. It therefore was a "last offer" within the meaning of §7.03.

The district court recognized this, albeit indirectly. The court's declaratory judgment reads: "Exxon's offer of $30 per ton omitted material terms and was not made in good faith. Accordingly, Exxon's 'last offer' to PSI for coal from the Monterey No. 2 Mine was $23.266 per ton." The district court itself thought that the specification of a Base is sufficient — that the parties can work out for themselves the adjustments needed to update Exhibit A as of January 1, 1993. The parties negotiated the original contract in this fashion, agreeing on a Base and the formulas of Exhibit A more than a year before deliveries began, while leaving its precise numbers to be filled in later. Whatever uncertainties there may be in the computation process do not change the fact that renegotiation under §7.03 concentrates on Base.

Under §7.03, "[e]ach party covenants with the other to participate in such negotiations in a good faith effort to reach agreement." Our supplemental order of July 12 remarked:

> [T]he Uniform Commercial Code defines "good faith" as "honesty in fact in the conduct or transaction concerned." UCC §1-201(19). An obligation to negotiate in good faith is not an obligation to be kind to one's trading partner or to refrain from taking commercial advantage of the contractual provisions one has negotiated. See *Kham & Nate's Shoes No. 2 v. first Bank of Whiting*, 908 F.2d 1351 (7th Cir. 1990). Nothing we have seen suggests that the contractual reference to "good faith" has a meaning other than the one specified by the UCC.

On remand the district court bypassed PSI's contention that Exxon's bids, approximately $6.75 per ton more than the market price later revealed by the Black Beauty bid, were themselves evidence of "bad faith." PSI had proposed that Exxon sell the coal for as little as $15 per ton, an even greater departure from the Black Beauty bid; when one side is persistently high and the other persistently low, it is hard for either to say that the other's departure demonstrates "bad faith." Nonetheless, the district court held, Exxon deviated from "honesty in fact" and therefore did not live up to its contractual obligation. This is a factual finding, so our review is deferential. *Anderson v. Bessemer City*, 470 U.S. 564 (1985). We conclude, however, that the finding is clearly erroneous.

The district court found that Exxon expected the price to be driven down to approximately $20.50 per ton at the mine mouth, 831 F. Supp. at 1437-38, or $25 per ton F.O.B. Gibson station. This finding is amply supported. The market for coal was weak, and for high-sulfur coal (the kind Exxon produced at Monterey No. 2) weaker still. During 1991 and early 1992, spot prices for such coal were $17 to $20 per ton. Exxon itself offered one million tons of this coal per year to Springfield, Illinois, for $20 per ton F.O.B. mine. But the PSI-Exxon contract called for 3 million tons per year, and a firm commitment of that size could fetch a premium, which Exxon's consultant pegged at approximately $2 per ton. Exxon did not reveal these assessments to PSI, which for that matter did not reveal its own internal assessments to Exxon. An obligation to negotiate "in good faith" nixes trickery and certain forms of obduracy, see *Market Street Associates Limited Partnership v. Frey*, 941 F.2d 588, 594-96 (7th Cir. 1991), but it does not require one side in negotiations to reveal its bargaining strategy or its reservation price, to disclose every tidbit that would be of use to the other side, or to refrain from taking advantage of its opportunities. See *Continental Bank, N.A. v. Everett*, 964 F.2d 701, 703-05 (7th Cir. 1992); E. Allan Farnsworth, 1 *Contracts* §3.26c at 341-45 (1990). Not even an employer's legal duty to negotiate in good faith with a union goes so far, see 29 U.S.C. §158(d) (duty

to bargain does not require the making of concessions), and the concept of good faith under the UCC, which applies to this contract, is decidedly more confined than the obligation to bargain in labor law.

The district court's key findings are:

> 34. Despite what it knew about the market price for coal from the Monterey No. 2 Mine, Exxon repeatedly advised PSI that the market would support a price in excess of $30 delivered to the Gibson Station. See Veenstra Testimony, Hearing Tr., at 60-61; Veenstra Testimony, Trial Tr., at 68-70; Veenstra Testimony, Trial Tr., at 134-135, 136; Veenstra Testimony, Trial Tr., at 191-192, 200.
>
> 35. Thus, Exxon's representations to PSI regarding the market price of its coal were knowingly and intentionally inaccurate. See Schwartz Testimony, Hearing Tr., at 25; Veenstra Testimony, Hearing Tr., at 59; Veenstra Testimony, Hearing Tr., at 109-110; Veenstra Testimony, Trial Tr., at 68-70; Veenstra Testimony, Trial Tr., at 134-135, 136; Veenstra Testimony, Trial Tr., at 191-192, 200.

831 F. Supp. at 1438. Exxon's bad faith lay, in other words, in lying to PSI about the market price for coal. The district court did not find that PSI was taken in, or even that there was a risk that PSI would be snookered. A breach of contract without injury — without even a potential for injury — does not lead to the sort of remedy imposed here. (A reduction in Base from $30 to $23.266 per ton is worth about $100 million during 1993-97). See *Rauch v. Circle Theatre*, 176 Ind. App. 130, 140, 374 N.E.2d 546, 553 (1978); see also *Lincoln National Life Insurance Co. v. NCR Corp.*, 772 F.2d 315, 320-22 (7th Cir. 1985). The antecedent problem, however, is that the portions of the record the district court cited offer no support for the conclusion that Exxon told a lie.

All of the district court's references are to testimony concerning four pages of price data Exxon's negotiating team handed to PSI's team (led by Robert Veenstra) during a meeting on March 18, 1992. Exxon's handout listed the price that

other public utilities in the Midwest were paying for coal under long-term contracts. The handout identified approximately 40 contracts by buyer, seller, and price — which ranged from $22.97 to $50.48 per ton, for an average of $31.70. In response to PSI's inquiry, Exxon said that it had assembled these data from forms the public utilities filed with the Federal Energy Regulatory Commission. Veenstra immediately dismissed the figures, remarking that many of the contracts had been negotiated more than a decade ago and were about to expire, while PSI and Exxon had to reach agreement on a new price in light of current conditions. The adjusted price of Exxon's own deliveries to PSI exceeded $38 per ton; PSI knew that that price greatly exceeded the current market and was not impressed by a demonstration that other utilities also had signed long-term contracts during period of higher prices. As Veenstra testified, the handout did not reflect "very good market intelligence." What we find dispositive, however, is that the handout was accurate in every particular. PSI has never suggested, and the district court did not find, that Exxon doctored the data to make the average price look higher, or even that it selected high-price contracts for inclusion while omitting lower-price contracts. If the district court meant that the data were inaccurate, the finding is clearly erroneous. If, instead, the district court meant that simply handing out a recap of prices being paid under long-term contracts signed years ago — as opposed to prices recently negotiated — establishes bad faith, the conclusion is a legal mistake. Exxon represented the document to be no more than what it was, and PSI was well able to apply the appropriate discount. CF. *Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 512-16 (7th Cir. 1989). Similarly, the court was legally mistaken if it believed that distributing accurate data establishes bad faith when the party believes that it will have to settle for less. That would be equivalent to saying that each negotiator must reveal his reservation price rather than take a hard line in bargaining.

Much of PSI's brief is devoted to an argument that permitting Exxon to use a Base of $30 during the next five years

simply isn't *fair* when the market price is about 20% lower. PSI believes that Exxon should not have maneuvered in an effort to retain a portion of its supra-market price. In commercial transactions, however, the question is not what is fair but what comports with the contract. An obligation to bargain in good faith differs from an obligation to make concessions, as it differs from a fiduciary duty. *Feldman v. Allegheny International, Inc.*, 850 F.2d 1217, 1223 (7th Cir. 1988) ("[O]ne cannot characterize self-interest as bad faith. No particular demand in negotiations could be deemed dishonest, even if it seemed outrageous to the other party."); Farnsworth, *Contracts* at 343. Parties may and often do write contracts calling for adjustment to market prices. *These* parties omitted such a provision. Courts frustrate rather than advance the institution of contract when they treat one kind of clause as if it were the other. Contracts allocate risks, and judicial reallocation interferes with not only negotiation but also the economic processes the contracts govern. By enforcing contractual language rather than molding it until the outcome looks more fair, *ex post*, courts in the end serve all contracting parties' interests.

Exxon offered to cut more than $8 per ton from the price it was charging in 1991; PSI wanted an even deeper reduction. Each side in this negotiation took a hard-nosed position. Just as Exxon's negotiating position was consistently above market, PSI's was consistently below. This contract contains a mechanism to bridge such a gap: the competitive offer. As our first opinion described, PSI set out to obtain the lowest bid it could, without regard to the structure imposed by the contract. Today might find PSI in a much better position had it solicited bids and negotiated with Exxon's rivals differently. Under the contract, when the parties do not agree and there is no valid competitive offer, the seller's last offer prevails. Not "the market price" in the abstract, but the seller's last offer. Persons negotiating such a contract would understand that this default rule gives the seller the whip hand; it is simultaneously an element of compensation for taking the risk of developing a new mine (which cost Exxon several hundred million dollars, 831 F.

Supp. at 1431) and a goad to accommodation. Knowing that it is apt to pay more than the market price if it fails to come up with a competitive offer, PSI had every incentive to be scrupulous in finding a proper bid. We concluded on the prior appeal that it had failed. Now we quantify the price of that failure: $30 per ton.

REVERSED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 21, 1994.

Before
HON. WILLIAM J. BAUER, *Circuit Judge*
HON. THOMAS M. REAVLEY, *Circuit Judge**
HON. FRANK H. EASTERBROOK, *Circuit Judge*

PSI ENERGY, INC., *Plaintiff-Appellee*,	)	Appeal from the
No. 93-3191 v.	)	United States
EXXON COAL USA, INC., and	)	District Court for
EXXON CORPORATION,	)	the Southern
Defendants-Appellants.	)	District of Indiana,
	)	Indianapolis
	)	Division.
	)	No. IP92 645-C
	)	Sarah Evans
	)	Barker, *Chief*
	)	*Judge.*

Order

Plaintiff-Appellee filed a petition for rehearing and suggestion of rehearing en banc on March 8, 1994. No judge in regular active service has requested a vote on the suggestion of rehearing en banc,** and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

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* Hon. Thomas M. Reavley, of the Fifth Circuit, sitting by designation.
** Judge Cummings and Judge Coffey did not participate in the consideration or decision of this case.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PSI ENERGY, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	IP92 645-C
	)	
EXXON COAL USA, INC., and	)	
EXXON CORPORATION through	)	
its Division Exxon Coal and	)	
Minerals Company,	)	
Defendants.	)	

ENTRY

PSI Energy, Inc., ("PSI") and Exxon are signatories to a twenty-five year contract (the "Contract") which requires Exxon to supply coal to PSI through the year 2001, subject to the parties agreeing at five-year intervals to a new base price (the "Base") and escalation provisions ("Exhibit A") which together determine the actual price of the coal "(the "Price"). The last renegotiation period ended on December 31, 1992. Long before that deadline, however, the parties realized that they were unable to agree on the meaning of Article VII to the Contract (the "reopener provision"), which governs renegotiation of the coal's price. Especially troublesome to the parties was Section 7.03, which states in pertinent part:

> Each party covenants with the other to participate in such negotiations in a good faith effort to reach agreement. If the parties are unable to reach agreement, BUYER will accept SELLER's last offer or present SELLER with a firm, written offer which it has received from another supplier, which it is willing to accept, for the supply of coal called for under the remaining term of this Agreement (herein referred to as a "competitive offer"). . . . If . . . the

> parties have not reached agreement upon a new base and SELLER declines to meet a competitive offer submitted by BUYER pursuant to the above provisions, this Agreement shall terminate at the end of the contract period in which notice of price renegotiation was given. . . .

Plaintiff's Exhibit 1. Because the parties were unable to reach agreement, PSI presented Exxon with what it believed was a competitive offer from the Black Beauty Coal Company ("Black Beauty"). The terms of the Black Beauty offer differed in many respects from the terms of the Contract. From Exxon's perspective, the most significant difference was Black Beauty's willingness to supply more than one PSI station from several of its mines, which Exxon contended prevented it from calculating a single base that it could meet. Exxon had always supplied just one PSI station — the Gibson Station in East Mount Carmel, Indiana — from its Monterey No. 2 Mine and had built that facility at a cost of several hundred million dollars with the understanding that its coal could be dedicated to PSI. Exxon believed that, with the exception of the base, a "competitive offer" presented under Section 7.03 had to have substantially the same terms as the Contract and that PSI was required to specify a new Base determined on a delivered basis to the Gibson Station.

In contrast, PSI read Section 7.03 as requiring Exxon to match all the terms and conditions of the competitive offer, or, at a minimum, match those terms that PSI deemed significant. The result of the parties' inability to agree was a lawsuit in which PSI asked this Court to enter a declaratory judgment that: (1) the written offer which PSI received from Black Beauty is a "competitive offer" within the meaning of the Contract; (2) Exxon did not meet the competitive offer, and therefore, the Contract shall terminate on December 31, 1992, or at PSI's election, at the end of the temporary continuance of deliveries as provided for in Section 7.04 of the Agreement; and (3) Exxon be prohibited from taking any action, at law, in equity, or otherwise, from enjoining or preventing or seeking to enjoin or prevent PSI from accepting and executing a new

agreement for the supply of coal under the Contract. A bench trial was conducted on December 1st, 2nd, 3rd, 4th, 7th and 8th, 1992.

This Court delivered its decision on December 28, 1992, granting PSI's request for declaratory relief and holding that the Contract was not ambiguous, that the Black Beauty offer was a "competitive offer", and that Exxon had failed to meet that offer. The Court began its analysis by noting that the primary purpose of Article VII is to manage market risk by allowing the parties to reconcile deviations in the Contract's price with the prevailing market price. It then rejected Exxon's interpretation of the reopener provision which required that any competitive offer mirror the terms of the Contract with the exception of the Base. It was this Court's view that restricting competition to only a single dimension — the base — would so limit the field of firms that would be able to tender an offer that it would undermine the competitive offer process. The Court explained:

> The evidence presented establishes that any given coal supplier occupies a unique market position. The competitive advantage it possesses depends on such factors as the quality of the coal it can produce, the distance that the coal must travel to the buyer, the nature of its mining operations, and other idiosyncratic variables. Not every competitive advantage, though, derives from efficiencies in the cost of production because other considerations besides cost enter into the decision calculus for the buyer. For example, the supplier's flexibility in scheduling and delivering the coal is also an important competitive dimension. *See* Masselink Depo. III, at 249. The point seems too obvious to warrant much discussion, but whether a coal buyer enters into a contract with a particular supplier depends on the totality of circumstances surrounding the contract and the overall value that it renders to the buyer. Thus, it is not impossible for a coal supplier which is situated at a farther distance from the buyer than a competitor, with an interior quality coal, to prevail in his negotiations with the buyer by offering non-cost related

concessions that offset whatever disadvantages he may face. Exxon's reading of the Agreement would foreclose any competition on non-base terms. Such a reading not only is inconsistent with the overriding purpose of Article VII, it also directly contradicts its express language. Article VII was included in the Agreement primarily to manage market risks. Exxon's interpretation, if adopted, would shift far too much risk onto PSI by creating a barrier to competition that few coal suppliers (*i.e.* third party competitors) could overcome. The Court can find no language in the Agreement that would warrant impeding market competition in this way.

Exxon's interpretation also betrays the parties' original intent as manifested in the words they chose to incorporate in the Agreement; "competitive", as that term is used in "competitive offer", means nothing less than fully competitive. Exxon's own reasoning supports this finding:

> [a]s a practical matter neither Exxon nor any other seller could meet literally all the terms and conditions of the Black Beauty offer. *That offer contains many idiosyncratic features tailored to the unique circumstances of Black Beauty's proposed operations.* Explicit reference is made to production at and sales from each of Black Beauty's three mines, by name; different coal quality standards for each mine; different "starting prices" are quoted for each mine; and delivered prices are calculated by adding to those "starting prices" the actual transportation costs incurred on each shipment from those mines.

Defendants' Trial Brief, at 32-33 (emphasis added).

The adage, "what is good for the goose is good for the gander," applies here. Exxon is just as uniquely situated in the market as Black Beauty. Why should the Court require Black Beauty to do what Exxon correctly implies is impossible: mirror all the terms of another coal suppliers' agreement and compete just on one term, the base? Simply put, the contract does not indicate that the parties intended that the third-party competitor would have to

> develop its offer shackled by the limitations that Exxon now seeks to impose. Under the Agreement, PSI had the right to obtain a competitive offer from another supplier which contained terms and conditions which were different from the terms and conditions of the Agreement.

Entry, at 17-19. Although the Court recognized the long-term nature of the Contract and the extent of Exxon's capital commitments to supply the Gibson Station, it could not ignore the fact that no sensible buyer would enter into an economic relationship which would leave its resources bottled-up for a quarter-century in a venture requiring it to pay above-market prices with only a modest hope that another firm would happen to occupy a market position that would make feasible the tender of a competitive offer.

The Court also rejected PSI's contention that Exxon was required to match all the terms of a competitive offer, as this would fail to protect Exxon's interest in maintaining predictability in the Contract's terms. The Contract was a twenty-five year contract and not five separate five-year contracts. The Court wrote:

> Pursuant to Section 7.05, Exxon need not modify anything but the Base to "meet" the competitive offer. PSI's interpretation of Section 7.03 that Exxon must match the competitive offer term for term and in kind is incorrect, as this would be contrary to the express meaning of Section 7.05. That Section states that "the purpose and intent of Sections 7.01 to 7.04, inclusive, are only to provide for renegotiation of Base and Exhibit A', and neither party shall inject into such negotiations, as a condition of agreement upon a new Price for the coal, any demand or request that other terms and conditions of this Agreement be altered." Because the competitive offer is not limited to base competition, as this is the only interpretation that would allow the third party competitor to bring the full range of its resources to bear in the marketplace, the meaning of Section 7.03 that Exxon "shall have the right to meet such competitive offer" means that it must be

> allowed to match the overall value that the competitive offer would confer on PSI. If it chose not to enter into negotiations outside of Article VII, Section 7.03 allows Exxon to offset non-base related concessions in the competitive offer with corresponding reductions in the Base.

Entry, at 21-22. Although value admittedly has a subjective component, the language of the reopener provision indicated to this Court that dialogue was to be an important part of the reopening process and that negotiations were to occur regarding how Exxon would "meet" a competitive offer. This Court found that "[n]othing in the language of Section 7.03 indicates that Exxon had the right to determine unilaterally whether it had met the competitive offer; based in part from experience with other reopener provisions, the parties recognized the necessity of discussing the competitive offer and making adjustments in their negotiating positions accordingly. *See* Brister Testimony, Trial Tr. at 679; Veenstra Depo. III, at 444-451; Ashley Depo. II, at 206-08." Entry, at 12. It was this Court's opinion that if all Exxon was required to do was match a single base figure which the competitive offer would supply, there really wouldn't be much to discuss or negotiate after the competitive offer had been received. Rather, the Court believed that the parties' expected to engage in bona fide negotiations even after that time.

Thus, it was the Court's view that the only reasonable interpretation of the Contract was one that would respect the legitimate expectations of both the buyer and the seller. To ensure that the competitive offer process was fully competitive, and thereby guarantee that the Contract price was in accord with the market, the Court refused to impose a requirement that competitive offers mirror the Contract's terms excepting the Base. The Court also refused to force Exxon to renegotiate an entirely new contract every five years. Exxon needed only to adjust the Base.

Exxon appealed to the Seventh Circuit Court of Appeals, which rendered its decision on April 15, 1993. Like the District

Court, the Court of Appeals found that a "competitive offer" did not need to duplicate the non-price terms of the Contract and that §7.05 entitles Exxon to match a competitive offer by changing only the Base and Exhibit A. *See PSI Energy, Inc. v. Exxon Coal USA, Inc.*, 991 F.2d 1265, 1270-71 (7th Cir. 1993). The Court of Appeals ruled, however, that the Contract contained a "latent ambiguity" resulting from "the unanticipated event . . . [of] a multi-mine competing bid, which makes the calculation of a single delivered price difficult." 991 F.2d at 1270. It also held that the District Court erred in finding that Exxon was required to modify the Base to reflect the value of the non-price elements of the competitor's bid:

> Exxon's ability to limit the competition to price, and price alone, for the kind of coal Exxon has to offer, is what makes this a genuinely long-term contract with corresponding protection for any relationship-specific capital investments. This cannot be achieved if Exxon must match the *value* of a rival's non-price terms by reducing its Base. Moreover, the entire conception of the renegotiation and competitive bid process as a way to mark Base to market would fail if non-price aspects of rival bids had to be evaluated and reflected in the Base. How can these terms be reduced to a single price? PSI does not know, and neither do we.

991 F.2d at 1270-71. The Court of Appeals therefore reversed the District Court and remanded the case so that it could

> consider arguments that it bypassed in light of its conclusion that Black Beauty's offer was competitive' and that Exxon had not met it. PSI maintained that Exxon did not renegotiate in good faith, as §7.03 requires, and that Exxon's 'last offer' was $23.266 rather than $30 because the offer of $30 lacked some important terms.

991 F.2d at 1272. The Court of Appeals further clarified the scope of the remand proceedings by way of its denial of Exxon's "Motion for Recall and Clarification of Mandate":

> The language in the opinion was designed to focus the attention of the parties and the district judge on a single ultimate question: what price will be effective as the Base until the next reopening? Whether the contract itself remains in force is an issue the panel fully considered and resolved. We wrote: "Under §7.03 [of the contract] the parties must proceed during 1993-97 using Exxon's 'last offer'." Exxon's bid of $30 per ton might be deemed not the "last offer" either because Exxon acted in bad faith in making that bid or because its offer omitted material terms; in either event $23.266 would become the "last offer."

PSI Energy, Inc. v. Exxon Coal USA, Inc., No. 93-1088, slip op. at 2 (7th Cir. July 12, 1993).

In deference to the Court of Appeals' well-reasoned instructions, this Court held a hearing on July 28, 1993, to consider whether Exxon renegotiated in good faith and whether Exxon's $30 offer omitted any material terms. Having heard and considered the evidence, the Court hereby finds that Exxon failed to renegotiate in good faith as §7.03 requires and that its offer of $30 was incomplete. The Court accordingly enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

Introduction

1. Plaintiff PSI is an Indiana corporation having its principal place of business in Plainfield, Indiana.

2. Defendant Exxon Corporation is a New Jersey corporation having its principal place of business in a state other than Indiana. Defendant Exxon Coal USA, Inc. is a Delaware corporation having its principal place of business in a state other than Indiana. Exxon Coal is a subsidiary of the Exxon Corporation. Exxon Coal USA, Inc., and Exxon Corporation are hereinafter referred to collectively as "Exxon".

3. The amount in controversy in this action exceeds $50,000.00, exclusive of interest and costs.

4. On April 26, 1974, PSI, which was then known as Public Service Company of Indiana, Inc., and The Carter Oil Company ("Carter") signed a long-term Coal Sale and Purchase Agreement (the "Contract"). Pursuant to the Contract, PSI agreed to purchase, and Carter agreed to supply, certain quantities of coal each year.

5. The Contract was assigned by Carter to the Monterey Coal Company ("Monterey").

6. Exxon Coal USA, Inc. is the successor by merger to the interests of Monterey.

The Contract

7. On February 6, 1984, the parties entered into a Contract Modification ("Modification"), which included revisions to Article VII of the Contract. Article VII is otherwise known to the parties as the "reopener".

8. Article VII of the Contract, as modified, provides:

> 7.01 The Price of coal delivered hereunder shall be computed from a Base of $11.07 per ton, hereafter called the "Base", and shall be determined by adding to or deducting from the Base appropriately for each price adjustment factor listed in Exhibit "A" attached hereto and as a part of this Agreement, and in accordance with the adjustment procedures there stated. The price as so determined shall be the basis for computing the compensation for deviations in the gross calorific value as provided in Article X.
>
> 7.02 *Price Renegotiation.* The Base specified above shall be subject to renegotiation as provided in this Article, with the next new Base to be effective as of January 1, 1993; and, if this Agreement continues in effect to the successive times herein specified, said Base (and any coal price agreed to pursuant to any renegotiation or competitive offering as provided for herein) shall again be subject to renegotiation, effective as of the start of the 16th contract year, and the start of the 21st contract year, all in the manner herein provided. For purposes of this

Article, the first contract period started January 1, 1978, and ended December 31, 1982; the second contract period started January 1, 1983, and ends December 31, 1987; the third contract period starts January 1, 1988, and ends December 31, 1992; the fourth contract period starts January 1, 1993, and ends December 31, 1997; and the fifth contract period starts January 1, 1998, and ends December 31, 2002. For purposes of this Article, the calendar year 1978 shall be deemed the first contract year.

7.03 Either party may require renegotiation of the Base by giving to the other, at any time in the first thirty (30) days of the fourth year of any contract period except the second contract period, written notice of its desire to do so. Promptly after the giving of such notice, the parties will commence negotiations to agree upon a new Base to be effective as of commencement of the next contract period. Each party covenants with the other to participate in such negotiations in a good faith effort to reach agreement. If the parties are unable to reach agreement, BUYER will accept SELLER's last offer or present SELLER with a firm, written offer which it has received from another supplier, which it is willing to accept, for the supply of coal called for under the remaining term of this Agreement (herein referred to as a "competitive offer"). It shall also provide SELLER with documentary proof of such offer, and permit SELLER to examine all supporting data and information submitted with the offer. SELLER shall have the right to meet such competitive offer.

If, by the one hundred and eightieth day preceding the end of the contract period in which notice of price renegotiation was given, the parties have agreed upon a new Base, appropriate changes shall be made to the adjustment factors provided in Exhibit "A". The Price of coal effective at the commencement of the next contract period shall be computed from the new Base adjusted under the provisions of Exhibit "A" from the reference date of the new Base. If, by such time, the parties have not reached agreement upon a new Base and SELLER

declines to meet a competitive offer submitted by BUYER pursuant to the above provisions, this Agreement shall terminate at the end of the contract period in which notice of price renegotiation was given, or at BUYER's election, at the end of the temporary continuance of deliveries as provided for in Section 7.04.

7.04 If in any such renegotiation of Base, the parties fail to reach agreement on a new Base and if SELLER declines to meet the competitive offer, and BUYER desires SELLER to continue delivering coal, then SELLER agrees to continue deliveries under the terms and conditions of this Agreement for the period of time BUYER shall designate, but not to exceed twenty-four (24) months beyond the current contract period. The Price to be paid for such additional coal shall be determined from a new Base equal to SELLER's last Base proposed in good faith during the negotiations, adjusted under appropriate amendments to Exhibit "A", from the reference date of the new Base.

7.05 It is understood and agreed that the purpose and intent of Sections 7.01 to 7.04, inclusive, are only to provide for renegotiation of Base and Exhibit "A", and neither party shall inject into such negotiations, as a condition of agreement upon a new Price for the coal, any demand or request that other terms and conditions of this Agreement be altered.

Plaintiff's Exhibit 1.

9. The primary purpose of Article VII of the Contract is to manage market risk. *See* Brister Testimony, Trial Transcript ("Trial Tr.") at 657-58; Veenstra Depo. I, at 22. The reopener allows the parties to reconcile deviations in the contract price with the prevailing market price. *See* Brister Testimony, Trial Tr. at 657-58; Veenstra Depo. II, at 140. As the Court of Appeals explained: "The possibility of a competitive offer, which defines the current market price, propels the parties toward agreement while ensuring that, as long as it charges no more than the current market price, the seller continues to

receive the business. And this is what the Exxon-PSI contract provides." *PSI Energy*, 991 F.2d at 1267.

10. Under the Modification, PSI was obligated to purchase at least 3,000,000 tons of coal annually, and Exxon was obligated to supply no more than 3,300,000 tons annually, from January 1, 1984, through December 31, 2002. *See* Contract, Contract Modification at 2.

Negotiations Between Exxon and PSI

11. On January 7, 1991, pursuant to Section 7.03 of the Contract, PSI gave written notice to Exxon of its desire to renegotiate the Base as provided in Article VII. *See* Plaintiff's Exhibit 14.

12. Exxon made its first reopener proposal to PSI on July 17, 1991, offering an undelivered price of $20.10 per ton. Subsequent offers by Exxon proposed higher prices. On November 26, 1991, Exxon proposed an undelivered price of $25.00 per ton. *See* Plaintiff's Exhibit 35. This offer was soon withdrawn, and on December 3, 1991, Exxon proposed a delivered price to the Gibson Station of $29.60 per ton. *See* Plaintiff's Exhibit 38.

13. On April 15, 1992, Exxon Coal and PSI agreed that: (1) their positions had become polarized and that they had been unable to reach agreement pursuant to Section 7.03 of the Contract; (2) PSI would submit a competitive offer along with an Exhibit "A" to Exxon Coal as early in May, 1992, as reasonably practicable; and (3) if Exxon Coal decided to meet the competitive offer, it would do so by written notification delivered to PSI no later than 5:00 p.m., Houston time, on July 3, 1992. *See* Plaintiff's Exhibit 53.

14. In a letter to PSI dated April 28, 1992, Exxon Coal presented PSI with its last offer within the meaning of Section 7.03 of the Contract. Exxon proposed a price of $30 per ton f.o.b. Gibson Station. *See* Plaintiff's Exhibit 58. Exxon did not furnish an Exhibit A with this offer. *See* Veenstra Testimony,

Hearing Transcript ("Hearing Tr."), at 79. PSI subsequently rejected Exxon's offer.

15. By May 11, 1992, PSI had received offers from three coal suppliers to furnish coal under the Contract. These offers came from the Black Beauty Coal Company, Freeman Coal Sales, and Franklin Coal Sales, *see* Veenstra Testimony, Trial Tr. at 70-71, and called for the same quantity of coal as the Contract, better quality, with penalties, lower price, and greater delivery flexibility. *See* Veenstra Testimony, Trial Tr. at 76.

16. PSI employed two mining consultants, John Sabo of Marshall Miller & Associates and Seth Schwartz of Energy Ventures Analysis, Inc., to evaluate the offers. Mr. Sabo is a mining engineer, and Mr. Schwartz is an expert on fuel contracts and pricing.

17. Based on the opinions of Messrs. Sabo and Schwartz, on May 13, 1992, PSI timely submitted to Exxon the offer from Black Beauty Coal Company as the competitive offer called for under Section 7.03.

18. Pursuant to the parties' memo of understanding of April 15, 1992, Exxon had until July 3, 1992 to meet the competitive offer.

19. On July 1, 1992, Exxon informed PSI that, based on certain assumptions, "meeting such Black Beauty offer would require that the new 'Base' (which would become effective under Section 7.01 of the Contract on January 1, 1993) would be $23.266 per ton." *See* Plaintiff's Exhibit 77, at 2.

20. On August 13, 1992, PSI informed Exxon that in its view, "Exxon [had] declined to meet th[e] Competitive Offer" and that "PSI hereby notifies Exxon that it does not elect to receive any temporary deliveries after December 31, 1992. . . ." Defendant's Exhibit 250.

The Coal Market

21. Coal is not a fungible resource. Its value to a utility depends on several defining characteristics which render unique any given quantity of coal. These include sulfur, BTU, ash and water content; ash fusion temperature; hardness; and delivery factors. *See* Veenstra Testimony, Trial Tr. at 13-26.

22. The coal supplied by Exxon under the Contract has come primarily from Exxon's Monterey No. 2 Mine, located in Clinton County, Illinois, which is part of the Illinois coal basin.

23. On the average, coal produced at the Monterey No. 2 Mine and delivered to PSI yields on combustion 6.2 pounds of sulfur dioxide per million BTU's (#SO_2/MMBTU). Coal from the Monterey No. 2 Mine is considered "high sulfur coal."

24. The Clean Air Act (CAA) requires all states to formulate an implementation plan (a "SIP") for national primary and secondary ambient air quality standards. *See* 42 U.S.C. §7410.

25. In 1988, pursuant to the CAA, the State of Indiana adopted a SIP for Gibson County that restricted PSI's sulfur dioxide emissions at the Gibson generating station.

26. Beginning January 1, 1992, the Gibson SIP limited SO_2 emissions to 3.57 pounds per million BTU, and futher reduces those emissions to 3.13 pounds of SO_2/MMBTU on January 1, 1994. *See* Veenstra Testimony, Trial Tr. at 16.

27. In 1990, amendments were passed to the CAA, which further affected the ability of PSI and other electric utilities to burn high sulfur coal. The amendments progressively reduce the amount of sulfur dioxide which utilities may emit. Specifically, the CAA imposes system-wide emissions limits of 2.5 pounds of SO_2/MMBTU starting January 1, 1995, *see* 42 U.S.C.A. §7651c (West Supp. 1992), and 1.2 pounds of SO_2/MMBTU starting January 1, 2000, *see* 42 U.S.C.A. §7651d (West Supp. 1992).

28. As the cost to utilities of burning high sulfur coal has increased, the market value of high sulfur coal has decreased

significantly. *See* Veenstra Testimony, Trial Tr. at 21; Chancellor Testimony, Trial Tr. at 264-65. Coal from the Illinois basin has not been immune from these market forces; the price of coal from the Illinois basin has dropped steadily over the last five years, especially high sulfur coal. *See* Chancellor Testimony, Trial Tr. at 265; Schwartz Testimony, Hearing Tr., at 19; Plaintiffs Exhibit 202, Appendix B, at 1; Plaintiffs Exhibit 202, Appendix C, at 1.

29. During 1991-1992, the market price for high-sulfur coal from the Illinois basin was approximately $17 to $20 a ton. *See* Veenstra Testimony, Hearing Tr., at 55.

30. The market for large tonnages of high sulfur coal is virtually non-existent. *See* Rawl Depo. at 157.

Exxon's Good Faith

31. In its earlier entry, this Court specifically found the PSI had negotiated with Exxon in good faith during 1991 and 1992. The Court did not reach the issue of Exxon's good faith because its findings that Black Beauty's offer was competitive and that Exxon had not met that offer made it unnecessary to address that issue.

32. As it entered into negotiations with PSI, Exxon knew that the market price for its coal at the Monterey No. 2 Mine was approximately $20 per ton. The evidence of this fact is abundant. *See, e.g.*, Plaintiffs Exhibit 203, at 3 ("Our current mine price to PSI is about $32/ton. PSI believes it can purchase coal for an equivalent of about $20/ton at No. 2 Mine. Thus, PSI expects to dramatically lower its prices for the 5-year period starting in 1993. We believe PSI's assessment is in the right range."); Plaintiffs Exhibit 202, Appendix B, at 3 ("The sales price is subject to renegotiation effective 1/1/93 and is expected to drop significantly at that time as it approaches a level closer to market. The sales price expected at that time ($20.50/ton) is slightly less than current operating costs ($23/ton YTD July 1990)."); Plaintiffs Exhibit 202, Appendix C, at 2; Plaintiffs

Exhibit 202, Appendix D, No. 5, at 1; Plaintiff's Exhibit 205, at 2; Plaintiff's Exhibit 207, at 2; Plaintiff's Exhibit 230, at 2, 12; Plaintiff's Exhibit 235; Plaintiff's Exhibit 266, at 1.

33. The uncontroverted documentary evidence from Exxon's own files establishes that they were operating on a factual basis with respect to the market value of the coal from the Monterey No. 2 Mine which they consistently misrepresented in their dealings with PSI. *See, e.g.*, Plaintiff's Exhibit 203, at 3 (Exxon Briefing Paper on PSI and the Monterey No. 2 Mine); Plaintiff's Exhibit 202, Appendix B, at 3 (Exxon Operations Plan); Plaintiff's Exhibit 202, Appendix C, at 2 (Exxon "Long-Term" Plan); Plaintiff's Exhibit 202, Appendix D, No. 5, at 1 (Exxon Marketing Analysis); Plaintiff's Exhibit 205, at 2 (Exxon Budget Memorandum); Plaintiff's Exhibit 207, at 2 (Exxon Budget Memorandum); Plaintiff's Exhibit 230, at 2, 12 (Exxon Briefing Paper); Plaintiff's Exhibit 235 (Exxon Market Projections for Illinois High Sulfur Coal); Plaintiff's Exhibit 266, at 1 (Monterey Memo to Employees).

34. Despite what it knew about the market price for coal from the Monterey No. 2 Mine, Exxon repeatedly advised PSI that the market would support a price in excess of $30 delivered to the Gibson Station. *See* Veenstra Testimony, Hearing Tr., at 60-61; Veenstra Testimony, Trial Tr., at 68-70; Veenstra Testimony, Trial Tr., at 134-135, 136; Veenstra Testimony, Trial Tr., at 191-192, 200.

35. Thus, Exxon's representations to PSI regarding the market price of its coal were knowingly and intentionally inaccurate. *See* Schwartz Testimony, Hearing Tr., at 25; Veenstra Testimony, Hearing Tr., at 59; Veenstra Testimony, Hearing Tr., at 109-110; Veenstra Testimony, Trial Tr., at 68-70; Veenstra Testimony, Trial Tr., at 134-135. 136; Veenstra Testimony, Trial Tr., at 191-192, 200.

36. The testimony of Wendell Ellis was in critical respects evasive and deceptive. For instance, when asked whether Exxon expected the market price for coal from the Monterey

No. 2 Mine to be approximately $17-$20 per ton at the start of the next contract period, his response was: "*I would not say it [i.e. the price of $17 to $20 per ton] represented what we expected it to be*; it represented what it could possibly be." Ellis Testimony, Hearing Tr., at 151 (emphasis added). Contrary to this representation by Mr. Ellis to the Court, there is no doubt from the documentary evidence created before and during these negotiations and discussions with PSI, *supra*, that Exxon fully expected the price of coal from the Monterey No. 2 Mine to be approximately $20 at the mine, *supra*. The Court is unable to afford much credibility to the testimony of Mr. Ellis.

Exhibit A and Exxon's $30 Offer

37. The purpose of the reopener is to renegotiate a new Price for the Contract. *See* Veenstra Testimony, Hearing Tr., at 54. Article VII of the Contract is plainly titled, "Price and Price Renegotiation".

38. Exhibit A contains the price adjustment provisions under the Contract. *See* Schwartz Testimony, Hearing Tr., at 15.

39. The Base and Exhibit A cumulatively define the Price under the Contract. *See* Schwartz Testimony, Hearing Tr., at 15; Veenstra Testimony, Hearing Tr., at 54; *see also* Contract Section 7.01.

40. It is not possible to calculate the Price under the Contract without an accompanying Exhibit A. *See* Schwartz Testimony, Hearing Tr., at 16; Veenstra Testimony, Hearing Tr., at 74; Veenstra Testimony, Trial Tr., at 55, 58; Plaintiff's Exhibit 241.

41. Because Exxon refused or failed to provide a proposed Exhibit A to PSI, PSI was unable to calculate a Price for Exxon's coal on or after January 1, 1993, from Exxon's $30 per ton offer, Plaintiff's Exhibit 58. *See* Schwartz Testimony, Hearing Tr. at 29; Veenstra Testimony, Hearing Tr., at 74; Veenstra Testimony, Hearing Tr., at 79 and 81; Veenstra Testimony,

Hearing Tr., at 89-91; Deposition of Andrew Twadelle, at 50, 122.

42. In addition, Section 7.05 of the Contract specifically requires that the parties renegotiate Exhibit A.

43. Throughout its negotiations with PSI, Exxon steadfastly refused to discuss the terms of Exhibit A. *See* Veenstra Testimony, Hearing Tr., at 78; Veenstra Testimony, Trial Tr., at 58-59; Veenstra Testimony, Trial Tr., at 75. With the exception of Exxon's offer of $29.60, Exxon refused to furnish PSI with a proposed Exhibit A. *See* Veenstra Testimony, Hearing Tr., at 75; Veenstra Testimony, Trial Tr., at 75.

44. The only Exhibit A which Exxon provided to PSI during these negotiations did not contain a reference date of January 1, 1993. Rather, it pegged the escalation time period to commence on December 1, 1991, 13 months prior to the start of the next contract period. *See* Veenstra Testimony, Trial Tr., at 61. As Mr. Veenstra explained to Mr. Ellis, "[w]ithout a firm Base price effective January 1, 1993, it will be difficult for us to solicit and compare potential competitive offers. We believe that an offer of a firm Base price referenced and effective January 1, 1993, is what is intended by Article VII of the Agreement, and we repeat our request to be provided with this number." Defendant's Exhibit 192.

45. The Court considers Mr. Robert Veenstra's testimony relating to the details of these negotiations with Exxon to be highly credible.

46. Any finding of fact which is determined hereafter to be a conclusion of law shall be treated as a conclusion of law and incorporated into the conclusions of law which follow.

CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1332(a)(1).

2. The Court has personal jurisdiction over the parties.

3. Pursuant to 28 U.S.C. 1391(a), venue in this action is proper in the Southern District of Indiana.

4. By its own terms, the Contract is to be interpreted in accordance with the laws of the State of Indiana.

5. Under the Indiana Uniform Commercial Code, "'Good faith' in the case of a merchant means honesty in fact and observance of reasonable commercial standards of fair dealing in the trade." Ind. Code §26-1-2-103(B) (Burns 1992).

6. Exxon did not negotiate in good faith with PSI. Having heard the testimony and evaluated the credibility of the witnesses, it is this Court's judgment that Exxon's representatives were not acting with honesty in their attempts to reach agreement with PSI, most specifically, in their assertions to PSI respecting the market value of their coal. While the concept of "taking commercial advantage of the contractual provisions one has negotiated", *PSI Energy*, No. 93-1088, slip op. at 2 (7th Cir. July 12, 1993), is squarely within the bounds of "good faith" bargaining under the Indiana U.C.C., Exxon exceeded the rules of fair play when it incorporated dishonesty and deception into its negotiating tactics. As stated previously, the statements of Exxon's representatives to PSI regarding the market price of the coal from the Monterey No. 2 Mine were not honest, and it was these statements which formed the basis for their $30 offer. In the words of one commentator, "[d]eception can destroy a contract';[1] by intentionally interjecting material misrepresentations of fact into the negotiations, Exxon was not "honest in fact" as required under the Indiana U.C.C. for "good faith" dealings.

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[1]Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 Ohio St., L.J. 1 (1987), *citing*, 12 S. Williston, A Treatise on the Law of Contracts §1486, at 321-22 (3d ed. 1970); *see generally*, Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Va. L. Rev. 195, 243 (1968) ("A party acts in bad faith when, in an attempt to stall or bluff, he pretends to dispute, not really believing in his position.").

7. In reaching this conclusion concerning "good faith", the Court has been careful to differentiate between the management of the Monterey Coal Company and the management of Exxon Coal and Minerals. From all evidence available to the Court, Monterey appears to have worked very hard to have the No. 2 Mine in a competitive posture by the time the reopener negotiations were in progress. *See* Plaintiff's Exhibit 202, Appendix C, at 3; Plaintiff's Exhibit 226. Unfortunately, Exxon's inartful and deceitful negotiating tactics only succeeded in alienating what should have been a valued customer.

8. Besides the underlying deceit in Exxon's $30 offer to PSI, it was an incomplete offer. The reopener in the Contract was included so that the parties could renegotiate the Price. Without an Exhibit A, it is impossible to calculate a Price under the Contract. *Supra.* Because Exxon's $30 offer failed to include an Exhibit A, PSI was prevented from being able to calculate a Price from that offer. *Supra.*

CONCLUSION

Exxon's offer of $30 per ton omitted material terms and was not made in good faith. Exxon's "last offer" to PSI for coal from the Monterey No. 2 Mine was therefore $23.266 per ton.

It is so ORDERED this 27th day of August, 1993.

/s/ Sarah Evans Barker

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PSI ENERGY, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	IP92 645-C
	)	
EXXON COAL USA, INC., and	)	
EXXON CORPORATION through	)	
its Division Exxon Coal and	)	
Minerals Company,	)	
Defendants.	)	

SUPPLEMENT TO FINAL JUDGMENT ENTERED PURSUANT TO ORDER OF REMAND

In accord with this Court's entry issued this date, Exxon's offer of $30 per ton omitted material terms and was not made in good faith. Accordingly, Exxon's "last offer" to PSI for coal from the Monterey No. 2 Mine was $23.266 per ton.

It is so ORDERED this 27th day of August, 1993.

/s/ Sarah Evans Barker
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: April 15, 1993.

Before
HON. WILLIAM J. BAUER, *Chief Judge*
HON. FRANK H. EASTERBROOK, *Circuit Judge*
HON. THOMAS M. REAVLEY, *Senior Circuit Judge**

No. 93-1088

PSI ENERGY, INC.,	)	Appeal from the
Plaintiff-Appellee	)	United States
v.	)	District Court for
EXXON COAL USA, INC., and	)	the Southern
EXXON CORPORATION, through	)	District of Indiana,
its Division EXXON COAL	)	Indianapolis
and MINERALS COMPANY,	)	Division
Defendants-Appellants	)	No. 92 C 645,
	)	Sarah Evans
	)	Barker, *Judge*

This case was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is REVERSED, with costs, and the case is REMANDED for further proceedings; Circuit Rule 36 shall not apply on remand, in accordance with the decision of this Court entered this date.

---

* The Hon. Thomas M. Reavley, of the Fifth Circuit, sitting by designation.

In The

United States Court of Appeals

For the Seventh Circuit

No. 93-1088
PSI ENERGY, INC.,

Plaintiff-Appellee,

v.

EXXON COAL USA, INC., and EXXON CORPORATION,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. IP92 645-C—**Sarah Evans Barker**, *Judge.*

ARGUED MARCH 31, 1993—DECIDED APRIL 15, 1993

Before BAUER, *Chief Judge*, EASTERBROOK, *Circuit Judge*, and REAVLEY, *Senior Circuit Judge.**

EASTERBROOK, *Circuit Judge.* PSI Energy burns coal to supply southern Indiana with electricity. Increasingly stringent environmental regulation requires PSI to limit the sulfur dioxide emitted from its plants. To do this PSI must install "scrubbers," large devices that precipitate the sulfur out of the stack gasses and leave a noxious slurry of sulfur and limestone. High costs of removing sulfur from coal after combustion give a competitive advantage to coal that contains less sulfur, and to plants situated in places where the EPA permits the emission of extra sulfur dioxide. Utilities that have not found the optimal mix of clean coal at low prices and pollution control technology

*Hon. Thomas M. Reavley, of the Fifth Circuit, sitting by designation.

have encountered pressure from regulatory agencies. See *Northern Indiana Public Service Co. v. Colorado Westmoreland, Inc.*, 667 F. Supp. 613 (N.D. Ind. 1987), affirmed mem., 845 F.2d 1024 (7th Cir. 1988); *Northern Indiana Public Service Co. v. Carbon County Coal Co.*, 799 F.2d 265 (7th Cir. 1986).

Nineteen years ago PSI Energy contracted with a predecessor to Exxon Coal for a 29-year supply of high-sulfur coal, some 3 million tons per year. Exxon's coal is approximately 3.3% sulfur, leading to 6.2 pounds of sulfur dioxide per million Btu. The EPA has reduced allowable emissions at PSI's Gibson generating station (where it burns the coal Exxon supplies) to 3.57 pounds of SO_2 per million Btu, and by 1995 PSI must cut these emissions to 2.5 pounds per million Btu. Complying with these rules requires additional scrubbers or reducing the sulfur content of the coal to be burned. Further reductions may lie in store, yet costly rules do not permit PSI to avoid its obligation. Under the agreement PSI must take the coal "regardless of conditions imposed by [environmental] laws, rules or regulations". Section 16.01. PSI would like to escape its commitment or drive down the price to recoup the cost of removing the sulfur from the coal Exxon delivers.

The contract provides a way to do just this. The price of coal is not fixed. It has several components: a "Base" defined as the price F.O.B. the customer's power plant (see U.C.C. §2-319) and a table of adjustments called "Exhibit A". These adjustments produce changes in the effective price on account of changes in the cost of labor, transportation, and the value of money, among other items. Other clauses of the contract provide still more adjustments. Article III reduces the price if the coal has too much water or ash and imposes a penalty for sulfur exceeding a defined limit. Thus the delivered price changes frequently. But mechanical computations according to Exhibit A and other clauses do not necessarily track the market for coal. At five-year intervals, the parties may renegotiate the Base and the table of adjustments. Fresh negotiation ensures

that the price in the long-term contract does not depart too far, or for too long, from the market price. Paul L. Joskow, *Price Adjustment in Long-Term Contracts: The Case of Coal*, 31 J.L. & Econ. 47 (1988); Victor P. Goldberg & John R. Erickson, *Quantity and Price Adjustment in Long-Term Contracts: A Case Study of Petroleum Coke*, 30 J.L. & Econ. 369 (1987). See generally Keith J. Crocker & Scott E. Masten, *Pretia Ex Machina? Prices and Process in Long-Term Contracts*, 34 J.L. & Econ. 69 (1991); Victor P. Goldberg, *Price Adjustment in Long-Term Contracts*, 1985 Wis. L. Rev. 527; Richard S. Lambert, *Long Term Contracts and Moral Hazard*, 14 Bell J. Econ. 441 (1983). Rising costs of removing sulfur after combustion have led to a substantial fall in the market price of high-sulfur coal relative to low-sulfur coal. Falling prices of energy in general also have undercut the market position of firms holding reserves of high-sulfur coal. PSI hoped to take advantage of both effects in renegotiating with Exxon during 1991 and 1992 for the new price to take effect on January 1, 1993. Because the Exhibit A adjustments were increasing the delivered price of Exxon's coal during the 1980s, while the market price for high-sulfur coal was eroding, PSI anticipated a substantial savings.

An opportunity to renegotiate in mid-contract poses the question: what happens if the parties do not agree? If, for example, the seller's last offer prevails in the event of disagreement, then the seller has little reason to reduce its price to the current market. There is a similar, though reversed, problem if the buyer's last bid prevails. If inability to agree permits the parties to walk away from the deal, then the arrangement is not really a long-term contract after all. It becomes a five-year contract with a framework for renewal on mutual consent. Yet the parties may have strong reasons for preferring a genuine long-term contract. A long-term contract allows each side to make capital investments that facilitate performance, investments in goods whose useful life exceeds five years, and which therefore may be sensible (if they are specialized in some way to the other party's needs) only if they can be amortized over a longer period.

One way to drive the offers together during price renegotiation, while preserving the long-term nature of the arrangement, is to permit the buyer to obtain other bids while allowing the seller to "match" these. The possibility of a competitive offer, which defines the current market price, propels the parties toward agreement while ensuring that, as long as it charges no more than the current market price, the seller continues to receive the business. And this is what the Exxon-PSI contract provides. Section 7.03 reads:

> Either party may require renegotiation of the Base by giving to the other, at any time in the first thirty (30) days of the fourth year of any contract period . . ., written notice of its desire to do so. Promptly after the giving of such notice, the parties will commence negotiations to agree upon a new Base to be effective as of commencement of the next contract period. Each party covenants with the other to participate in such negotiations in a good faith effort to reach agreement. If the parties are unable to reach agreement, BUYER will accept SELLER's last offer or present SELLER with a firm, written offer which it has received from another supplier, which it is willing to accept, for the supply of coal called for under the remaining term of this Agreement (herein referred to as a "competitive offer"). It shall also provide SELLER with documentary proof of such offer, and permit SELLER to examine all supporting data and information submitted with the offer. SELLER shall have the right to meet such competitive offer.
>
> If, by the one hundred and eightieth day preceding the end of the contract period in which notice of price renegotiation was given, the parties have agreed upon a new Base, appropriate changes shall be made to the adjustment factors provided in Exhibit "A". The Price of coal effective at the commencement of the next contract period shall be computed from the new Base adjusted under the provisions of Exhibit "A" from the reference date of the new Base. If, by such time, the parties have not reached agreement upon a new Base and SELLER declines to meet a competitive offer submitted by

> BUYER pursuant to the above provisions, this Agreement shall terminate at the end of the contract period in which notice of price renegotiation was given, or at BUYER's election, at the end of the temporary continuance of deliveries as provided for in Section 7.04.

Notice that the objective of the renegotiation is to update the Base in light of market conditions. The contract contemplates price negotiation for an identified product, not a bid for a different product or the reworking of the many other terms. Coal differs in multiple dimensions, including sulfur, ash, water, and heat content. Renegotiation or competitive bidding on a price per ton is futile unless these attributes of quality are held constant. To assure this, §7.05 provides:

> It is understood and agreed that the purpose and intent of Sections 7.01 to 7.04, inclusive, are only to provide for renegotiation of Base and Exhibit "A", and neither party shall inject into such negotiations, as a condition of agreement upon a new Price for the coal, any demand or request that other terms and conditions of this Agreement be altered.

Sections 7.03 and 7.05 need not mean that a competitive bid must *duplicate* the Exxon-PSI arrangement. Identical terms are impossible, given that Exxon supplies PSI with coal from a mine in Clinton County, Illinois. Rivals will offer deliveries from different places, and different coals necessarily will have different sulfur, ash, water, and heat contents. What §§7.03 and 7.05 make clear, however, is that Exxon can respond to competition by reducing its price without altering other features of the arrangement. This protects both sides from the expropriation of any relationship-specific capital investments. Exxon can't raise the price above market, and a competitive bid will reflect the cost to other producers that have yet to make any relationship-specific investments, so that Exxon can recover the costs of its own investments. The matching process also becomes simple. Just as other bidders need not duplicate Exxon's terms, so Exxon need not match its rivals'. Differences

in the quality of coal are handled by the terms of the original agreement: for example, "dirtier" coal offered by a rival incurs a penalty under Article III, enabling the parties to disregard the sulfur content and compare the bids by looking at Base alone.

When PSI exercised its right in 1991 to renegotiate the price for the five-year period beginning January 1, 1993, adjustments under Exhibit A had driven the delivered price of coal to more than $37 per ton. Exxon concedes that "this was considerably higher than the prevailing price for coal of comparable quality." Several rounds of offers left the parties far apart. PSI contended that a price of $17 per ton, F.O.B. Mine, would be generous, while Exxon proposed a price of approximately $25 F.O.B. mine. At PSI's request, Exxon made a final Base offer: $30 F.O.B. the Gibson station, in the process updating all of the Exhibit A adjustments so that as of January 1, 1993, this would be the full delivered price for the coal.

Concluding that it could do better, PSI solicited competitive offers. Its call for bids invited other suppliers to fix their own terms. PSI did not ask them to come as close as possible to the provisions of the Exxon-PSI contract, limiting the competition to price. It did not ask them to submit alternative bids, one using the terms they preferred and the other using the Exxon-PSI agreement as a model. Not surprisingly, the bids PSI received differed dramatically in both price and structure from those embodied in the Exxon-PSI agreement. Of the three bids it received, PSI favored that submitted by Black Beauty Coal Company. Although Black Beauty offered high-sulfur coal, its sulfur dioxide emission of 5.0 to 6.2 pounds per million Btu is less than that of Exxon's coal. In just about every other way, too, Black Beauty's offer is superior to the Exxon-PSI contract: lower price, more flexible delivery terms, a more lenient force majeure clause, and so on. Because Black Beauty's mines are closer to PSI's generating stations, transportation costs also would fall. One catch is hidden in this last sentence: Black Beauty's mines. Instead of offering approximately 3 million

tons of coal annually from one mine, Black Beauty offered approximately 1 million tons of coal annually from each of the three mines. Three different coal seams, in three different locations, with three different price-quality combinations. Under the Black Beauty offer, each mine's coal has a separate "starting price" F.O.B. mine, with adjustments. PSI may designate any of the three mines as the source for deliveries to a number of its generating stations.

Flexibility in designating sources would enable PSI to curtail its transportation costs and to mix Black Beauty's coal with low-sulfur coal at several stations, rather than burning everything at Gibson, as it had been doing with Exxon's deliveries. But the multi-mine offer posed a problem for Exxon. How was it to match this amalgam of price-quality-delivery combinations with a single Base price, as §§7.03 and 7.05 contemplate? PSI did not furnish Exxon with an estimate of the equivalent Base that would meet Black Beauty's offer. Instead it demanded that Exxon duplicate all terms of the Black Beauty bid. Exxon, which interpreted the contract to require (and allow) a single Base price, F.O.B. the Gibson station, countered that Black Beauty's multi-price offer was not a "competitive offer" within the meaning of §7.03. The only way to make that offer competitive, Exxon insisted, would be to construct a weighted price. This it did, as follows:

Mine	Annual Tonnage	Percentage Weight	F.O.B. Gibson Price	Weighted Price
Columbia	1,100,000	.366667	$19.50/ton	$7.150/ton
Miller Creek	800,000	.266667	$26.75	$7.133
Viking	1,100,000	.366667	$24.50	$8.983
Weighted Average Price F.O.B. Gibson				$23.266

Each of Black Beauty's three mines had a minimum and maximum annual tonnage under the proposed contract. Exxon

started with the minimum annual tonnage from each mine. The "percentage weight" is this number divided by 3 million tons. Exxon added freight from each mine to the Gibson power station to derive that mine's F.O.B. Gibson price. Multiplying this price by the percentage weight yields a weighted price; adding these three produces the expected price per ton F.O.B. Gibson. (Using the mean or maximum tonnages from each mine would have produced a slightly higher price F.O.B. Gibson.) Exxon told PSI that it would be willing to match this price, $23.266 per ton, and to adopt Black Beauty's Exhibit A adjustments verbatim, if the Black Beauty bid were indeed a "competitive offer."

PSI denied that Exxon's calculation was correct but offered no alternative. Instead it commenced this diversity suit, seeking a declaratory judgment that Exxon has failed to meet a competitive bid, so that the contract terminates on January 1, 1993. PSI insisted that Exxon could match the Black Beauty offer only by matching the delivered price to each of its generating stations, and by making additional concessions tracking Black Beauty's favorable non-price terms (such as the generous force majeure clause). Exxon filed a counterclaim seeking a declaration that the Black Beauty offer is not a "competitive offer" and that, if it is, a Base of $23.266 per ton matches the offer. Exxon asked the district court to declare that Base for the period beginning on January 1, 1993, is its offer of $30 plus an updated Exhibit A. PSI rejoined that the "real" last offer was $23.266, not $30. On one thing the parties agreed: Indiana law governs.

The district court held an expedited trial. Ruling that Black Beauty's bid is a "competitive offer" that Exxon had not met, the court issued the requested declaratory judgment on December 28, 1992. The court concluded that the Exxon-PSI agreement is not ambiguous, that a rival bid need not incorporate the material terms of the Exxon-PSI agreement to be a "competitive offer", but that Exxon can meet such an offer by adjusting its Base price alone. That is, the court rejected PSI's

argument that Exxon must duplicate all of the rival's non-price terms. Nonetheless, the court concluded, in order to match an offer containing valuable non-price concessions, Exxon must "offset non-base related concessions in the competitive offer with corresponding reductions on the Base." Because Exxon had not done this, and because it had not afforded PSI delivery flexibility that would lead to reduced transportation costs, $23.266 per ton did not match the value of Black Beauty's offer to PSI, and the contract terminated. We accelerated Exxon's appeal.

We are less certain than the district court that the contract is unambiguous. Exxon offered one reading, PSI another, and the district judge rejected *both*, reading the agreement in a way no one had suggested. This implies a latent ambiguity—a problem that becomes apparent only when an event that the parties did not contemplate occurs. See *Amoco Oil Co. v. Ashcraft*, 791 F.2d 519, 521 (7th Cir. 1986); *Ohio Casualty Group v. Gray*, 746 F.2d 381, 383 (7th Cir. 1984) (both discussing Indiana law). That unanticipated event is a multi-mine competing bid, which makes the calculation of a single delivered price difficult. A court encountering a latent ambiguity should try to reconstruct "how the parties would have dealt with the contingency had they made specific provision for it." *Amoco*, 791 F.2d at 521. The kinds of extrinsic evidence the parties offered—such as PSI's internal planning documents from the 1980s and that firm's submissions to the state electricity regulatory commission between 1988 and 1990—are not helpful in addressing that question. Instead, when the language of the contract runs out, we must try to understand the *function* of the language and complete the agreement in light of the parties' mutual objectives.

Section 7.03, which establishes the competitive offer procedure, does not specify the allowable contents of an outside bid. Like the district court, we believe that a "competitive offer" cannot be limited to one duplicating the Exxon-PSI agreement and changing only the Base price plus Exhibit A.

Duplication is impossible, if only because another supplier's coal will come from a mine other than Monterey No. 2 in Clinton County. Article III of the Exxon-PSI contract, coupled with Exhibit A, provides automatic adjustments for the most common quality veriables. If another producer's coal has more ash, or a different quantity of sulfur, or a different point of origin, the allowance can be read off the contract. Each party's Base bid will capture the effects of these variances.

Article III was written to penalize excess ash, water, sulfur, and the like. Thus if a competitor's coal is cleaner than Exxon's, or burns better, there is no comparable adjustment. Other clauses, such as Article XI on force majeure, do not contain price adjustments of any kind. This means that a rival's bid can be superior, from PSI's perspective, even at the same price per ton Exxon proposes to charge. An effort to obtain the maximum value from other offers is what led PSI to argue that *any* bid, even one with substantially different terms and multiple prices, is a "competitive offer" that Exxon may "meet" only by matching the rival's terms as well as its price. Anything else diminishes the power of competition.

In deciding whether Black Beauty's offer was competitive within the meaning of §7.03, it is helpful to consider how, under §7.05, Exxon responds. All agree that under §7.05 Exxon need not renegotiate with PSI anything other than Base and Exhibit A. That is what §7.05 says, describing "the purpose and intent of Sections 7.01 to 7.04, inclusive". As we read this contract, the competitive offer process established by §7.03 is an integral part of price renegotiation—the potential for competition is the engine driving renegotiation, and by meeting a rival's offer Exxon agrees to a renegotiated price. Exxon and PSI agreed at the outset that they would be better off with a long-term contract, including some insulation from the full vigor of competition during the next three decades, than with a short contract followed by an entirely fresh competition for the business. Exxon's ability to limit the competition to price, and price alone, for the kind of coal Exxon has to offer, is what makes this

a genuinely long-term contract, with corresponding protection for any relationship-specific captial investments. This cannot be achieved if Exxon must match the *value* of a rival's non-price terms by reducing its Base. Moreover, the entire conception of the renegotiation and competitive bid process as a way to mark Base to market would fail if non-price aspects of rival bids had to be evaluated and reflected in the Base. How can these terms be reduced to a single price? PSI does not know, and neither do we. This is why PSI argued in the district court that Exxon must match the terms themselves, and not offer price concessions derived from the value of the non-price terms. Where this leads us, however, is agreement with the district court that §7.05 entitles Exxon to match a "competitive offer" by changing its Base and Exhibit A, without matching non-price elements of the rival's bid.

This understanding of what Exxon must do to match an offer implies limits on the content of a "competitive offer." An offer may be "competitive" although the non-price terms differ in some material respects from the terms of the Exxon-PSI contract, but that one indispensible element of a "competitive offer" is a price that can be matched by a single Base. Black Beauty quoted three starting prices, not one, and with multiple potential adjustments. This is not a "competitive offer" because it cannot be matched by a single Base. Exxon tried to derive a single equivalent from Black Beauty's offer. By insisting that this conversion was inaccurate—indeed, that a conversion to a single price was impossible and irrelevant—PSI disqualified the Black Beauty bid from treatment as a "competitive offer." Exxon did not need to match what could not be matched. Under §7.03 the parties must proceed during 1993-97 using Exxon's "last offer".

Although not strictly necessary, it is prudent to resolve the parties' dispute about Exxon's basing point. PSI observes that the agreement does not limit deliveries to the Gibson plant, although it concedes that with the exception of a single shipment all of Exxon's coal has gone to Gibson. PSI may instruct

Exxon to deliver coal to any of its plants. Application of Exhibit A leads to an automatic price adjustment: if delivery to this other plant is more costly than delivery to Gibson, Exxon adds the difference in freight; if delivery is less costly, Exxon deducts the difference. That PSI can select a designation of its choice does not imply that Exxon must quote multiple base prices. The agreement contemplates one Base, with adjustments for higher or lower freight made through Exhibit A. Exxon is entitled to use Gibson as the basing point for that single Base, and for purposes of meeting another bid. Section 6.01 could not be clearer: "Coal shall be delivered to BUYER by SELLER, F.O.B. BUYER's Gibson Power Plant, or other points in Indiana which BUYER designates." Because there is only one Base, the price must be F.O.B. Gibson. PSI has never asked Exxon to change the (sole) Base to a station other than Gibson. Quite the contrary, PSI instructed Exxon to quote, as its "last offer", a single Base F.O.B. Gibson, with an updated Exhibit A.

One final comment is appropriate. We have reasoned backward, from the matching process to a definition of a "competitive offer", on the assumption that all of the non-price terms in another bid would be more favorable to PSI. Suppose it were the other way around—for example, that the rival's bid called for PSI to pay for the draglines and other equipment, in exchange for which the rival would reduce its price dramatically. By matching the rival's price, Exxon would be swallowing the value of PSI's concession—a concession PSI extended only to the rival, not to Exxon. Such a possibility leads to the conclusion that a bid is not a "competitive offer" unless all of the terms are at least as favorable to PSI as the terms in the Exxon-PSI agreement. Black Beauty's bid omits any provision comparable to Article VIII of the Exxon-PSI contract, entitled "price relief for economic hardship". Exxon submits that this omission disqualifies the Black Beauty bid. Our approach makes an answer to this contention unnecessary, but it should be apparent that in the round of renegotiation preceding the final five-year period (which begins January 1, 1998) a rival bid

inferior to Exxon's in any material respect runs a substantial risk of being deemed not a "competitive offer".

The judgment is reversed, and the case is remanded so that the district court may consider arguments that it bypassed in light of its conclusion that Black Beauty's offer was "competitive" and that Exxon had not met it. PSI maintained that Exxon did not renegotiate in good faith, as §7.03 requires, and that Exxon's "last offer" was $23.266 rather than $30 because the offer of $30 lacked some important terms. It would be inappropriate for us to address these questions without the benefit of the district court's views. Circuit Rule 36 shall not apply on remand.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

May 20, 1993.

Before
HON. WILLIAM J. BAUER, *Chief Judge*
HON. FRANK H. EASTERBROOK, *Circuit Judge*
HON. THOMAS M. REAVLEY, *Senior Circuit Judge**

PSI ENERGY, INC., *Plaintiff-Appellee*,	)	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 93-1088 v.	)	
EXXON COAL USA, INC., and EXXON CORPORATION,	)	
Defendants-Appellants.	)	No. IP92 645-C Sarah Evans Barker, *Judge*.

Order

Defendants-Appellants filed a petition for rehearing on April 26, 1993, and Plaintiff-Appellee filed a petition for rehearing on April 29, 1993. All of the judges on the panel have voted to deny rehearing. The petitions for rehearing are therefore DENIED.

Any proceedings after remand will return to this panel. Counsel should alert the clerk when filing their briefs.

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* Hon. Thomas M. Reavley, of the Fifth Circuit, sitting by designation.

In The

United States Court of Appeals

For the Seventh Circuit

No. 93-1088
PSI ENERGY, INC.,

Plaintiff-Appellee,

v.

EXXON COAL USA, INC., and EXXON CORPORATION,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. IP92 645-C—**Sarah Evans Barker,** *Judge.*

On Motion for Recall and Clarification of Mandate

SUBMITTED JULY 2, 1993—DECIDED JULY 12, 1993

Before BAUER, *Chief Judge,* EASTERBROOK, *Circuit Judge,* and REAVLEY, *Senior Circuit Judge.**

PER CURIAM. Our opinion in this case reversed the district court's judgment and remanded "so that the district court may consider arguments that it bypassed in light of its conclusion that Black Beauty's offer was 'competitive' and that Exxon had not met it. PSI maintained that Exxon did not renegotiate in good faith, as §7.03 requires, and that Exxon's 'last offer' was $23.266 rather than $30 because the offer of $30 lacked some

*Hon. Thomas M. Reavley, of the Fifth Circuit, sitting by designation.

important terms." Exxon has asked us to recall and clarify our mandate because PSI has understood this direction as authorization to continue litigating its claims that it is not obliged to accept deliveries from Exxon during 1993-97, and Exxon interprets an order of the district court as inviting such an argument at a hearing scheduled for July 28, 1993.

The language in the opinion was designed to focus the attention of the parties and the district judge on a single utlimate question: what price will be effective as the Base until the next reopening? Whether the contract itself remains in force is an issue the panel fully considered and resolved. We wrote: "Under §7.03 [of the contract] the parties must proceed during 1993-97 using Exxon's 'last offer'." Exxon's bid of $30 per ton might be deemed not the "last offer" either because Exxon acted in bad faith in making that bid or because its offer omitted material terms; in either event $23.266 would become the "last offer." Nothing in our opinion invited or allowed the parties to continue litigating the existence of Exxon's obligation to deliver, and PSI's obligation to take and pay for, the coal during the period before the next price reopening. If, as Exxon states (and PSI does not deny), PSI is refusing to accept deliveries, then the proceedings on remand must be enlarged to determine the damages PSI owes for breach of contract.

PSI's apparent belief that it has additional evidence does not justify a general enlargement of the issue on remand. Once the appellate court has spoke, a district court is free to revisit a subject only on account of an intervening change of law (none comes to mind) or fraud on the court. The sort of evidence PSI mentions does not fall into the latter category; indeed we do not see its relevance to any issue open on remand. PSI apparently believes that Exxon's obligation to negotiate "in good faith" is an obligation to reduce its price without prodding. Yet the Uniform Commercial Code defines "good faith" as "honesty in fact in the conduct or transaction concerned." UCC §1-201(19). An obligation to negotiate in good faith is not an obligation to be kind to one's trading partner or to refrain from taking commer-

cial advantage of the contractual provisions one has negotiated. See *Kham & Nate's Shoes No. 2 v. First Bank of Whiting*, 908 F.2d 1351 (7th Cir. 1990). Nothing we have seen suggest that the contractual reference to "good faith" has a meaning other than the one specified by the UCC.

Although PSI seriously misreads our opinion, Exxon has not persuaded us that the district court also misreads it. That court's order permits the parties to introduce additional evidence and make arguments limited to: "whether Exxon participated in negotiations in good faith toward reaching an agreement and whether its 'last offer' was the $23.266 amount rather than the $30 amount." We are confident that the district court will carry out this court's mandate and accordingly deny Exxon's motion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PSI Energy, Inc.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	IP92 645-C
	)	
Exxon Coal USA, Inc., and	)	
Exxon Corporation through	)	
its Division Exxon Coal and	)	
Minerals Company,	)	
Defendants.	)	

AMENDED ENTRY NUNC PRO TUNC

On December 28, 1992, the Court issued its Entry and Judgment in the above named action. The parties have since moved the Court to amend the Entry and Judgment by: (1) expressly granting or denying the relief requested in Exxon Coal's Amended Counterclaim; (2) expressly granting or denying PSI's request for a declaration that Exxon be enjoined from taking or seeking any action, at law, in equity, or otherwise, to prevent PSI Energy from accepting and executing a new agreement for the supply of coal under the Agreement; and (3) changing the Entry at page 23, line 19 to read "The competitive offer must be one that PSI is 'willing to accept' . . ." *See Joint Motion for Amended Judgment and Amended Entry,* at ¶6. The parties also advise the Court that, contrary to what is stated in footnote one (1) of the Court's Entry, they "did not intend, by their stipulation, to limit the issues for decision and intended for the Court to proceed to rule on all issues presented by the Complaint and Amended Counterclaim. The stipulation was intended only to obviate the necessity of filing any further claims or pleadings." *Id.* at ¶3.

Having considered the parties' requests, the Court hereby amends its Entry as follows:

(1) Footnote one (1) on page two (2) of the Entry is deleted;

(2) Lines 18-19 on page 23 of the Entry are amended to read: "The competitive offer must be one that PSI is 'willing to accept' . . .";

(3) The following language is added to the end of the single paragraph appearing on page 25 of the Entry: "The relief requested in Exxon's Amended Counterclaim is DENIED. PSI's request for a declaration that Exxon is prohibited from taking any action, at law, in equity, or otherwise, from enjoining or preventing or seeking to enjoin or prevent, PSI Energy from accepting and executing a new agreement for the supply of coal under the Agreement is DENIED for the reason that such relief was not supported by the evidence adduced at trial."[1]

(4) An Amended Judgment shall issue containing the following language: "The relief requested in Exxon's Amended Counterclaim is DENIED. PSI's request for a declaration that Exxon is prohibited from taking any action, at law, in equity, or otherwise, from enjoining or preventing or seeking to enjoin or prevent, PSI Energy from accepting and executing a new agreement for the supply of coal under the Agreement is also DENIED."

It is so ORDERED this 7th day of January, 1993 nunc pro tunc to December 28, 1992.

/s/ Sarah Evans Barker

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

[1] Any interference with or violation of the Court's Judgment, as amended, would, of course, be actionable as contempt, however.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PSI ENERGY, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	IP92 645-C
	)	
EXXON COAL USA, INC., and	)	
EXXON CORPORATION through	)	
its Division EXXON COAL AND	)	
MINERALS COMPANY,	)	
Defendants.	)	

ENTRY

The controversy in this lawsuit centers on the meaning of certain provisions in a contract that PSI Energy, Inc. ("PSI") and Exxon's predecessor in interest entered into eighteen (18) years ago, and that the parties modified in 1984. The contract, as amended, in general calls for Exxon Coal to continue to supply PSI with more than three million tons of coal annually for the next ten years at prices that are subject to escalation. Plaintiff PSI asks the Court to enter a declaratory judgment that: (1) the written offer which PSI received from the Black Beauty Coal Company ("Black Beauty") is a "competitive offer" within the meaning of the Agreement; (2) Exxon did not meet the competitive offer, and therefore, the Agreement shall terminate on December 31, 1992, or at PSI's election, at the end of the temporary continuance of deliveries as provided for in Section 7.04 of the Agreement; and (3) Exxon is prohibited from taking any action, at law, in equity, or otherwise, from enjoining or preventing or seeking to enjoin or prevent, PSI from accepting and executing a new agreement for the supply

of coal under the contract.[1] A bench trial was conducted on December 1st, 2nd, 3rd, 4th, 7th and 8th, 1992. Having heard and considered the evidence, the Court hereby *GRANTS* PSI's request for declaratory relief, and holds that the Black Beauty offer is a "competitive offer" and that Exxon has failed to meet that offer. The Court, accordingly, enters the following findings of fact and conclusions of law.

Findings Of Fact

1. Plaintiff PSI is an Indiana corporation having its principal place of business in Plainfield, Indiana.

2. Defendant Exxon Corporation is a New Jersey corporation having its principal place of business in a state other than Indiana. Defendant Exxon Coal USA, Inc. is a Delaware corporation having its principal place of business in a state other than Indiana. Exxon Coal is a subsidiary of the Exxon Corporation. Exxon Coal USA, Inc., and Exxon Corporation are hereinafter referred to collectively as "Exxon".

3. The amount in controversy in this action exceeds $50,000.00, exclusive of interest and costs.

4. On April 26, 1974, PSI, which was then known as Public Service Company of Indiana, Inc., and The Carter Oil Company ("Carter") signed a long-term Coal Sale and Purchase Agreement (the "Agreement"). Pursuant to the Agrement, PSI agreed to purchase, and Carter agreed to supply, certain quantities of coal each year.

5. The Agreement was assigned by Carter to the Monterey Coal Company ("Monterey").

6. Exxon Coal USA, Inc. is the successor by merger to the interests of Monterey.

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[1] The Court will not address PSI's demand for injunctive relief because the parties have by their stipulation withdrawn that claim from these proceedings at this time. *See* Stipulation, November 18, 1992, at ¶4.

7. On February 6, 1984, the parties entered into a Contract Modification ("Modification"), which included revisions to Article VII of the Agreement. Article VII is otherwise known to the parties as the "reopener."

8. Article VII of the Agreement, as modified, provides:

> 7.01 The Price of coal delivered hereunder shall be computed from a Base of $11.07 per ton, hereafter called the "Base", and shall be determined by adding to or deducting from the Base appropriately for each price adjustment factor listed in Exhibit "A" attached hereto and as a part of this Agreement, and in accordance with the adjustment procedures there stated. The price as so determined shall be the basis for computing the compensation for deviations in the gross calorific value as provided in Article X.
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> 7.02 *Price Renegotiation.* The Base specified above shall be subject to renegotiation as provided in this Article, with the next new Base to be effective as of January 1, 1993; and, if this Agreement continues in effect to the successive times herein specified, said Base (and any coal price agreed to pursuant to any renegotiation or competitive offering as provided for herein) shall again be subject to renegotiation, effective as of the start of the 16th contract year, and the start of the 21st contract year, all in the manner herein provided. For purposes of this Article, the first contract period started January 1, 1978, and ended December 31, 1982; the second contract period started January 1, 1983, and ends December 31, 1987; the third contract period starts January 1, 1988, and ends December 31, 1992; the fourth contract period starts January 1, 1993, and ends December 31, 1997; and the fifth contract period starts January 1, 1998, and ends December 31, 2002. For purposes of this Article, the calendar year 1978 shall be deemed the first contract year.
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> 7.03 Either party may require renegotiation of the Base by giving to the other, at any time in the first thirty (30) days of the fourth year of any contract period except the second contract period, written notice of its desire to do so. Promptly after the giving of such notice, the parties

will commence negotiations to agree upon a new Base to be effective as of commencement of the next contract period. Each party covenants with the other to participate in such negotiations in a good faith effort to reach agreement. If the parties are unable to reach agreement, BUYER will accept SELLER's last offer or present SELLER with a firm, written offer which it has received from another supplier, which it is willing to accept, for the supply of coal called for under the remaining term of this Agreement (herein referred to as a "competitive offer"). It shall also provide SELLER with documentary proof of such offer, and permit SELLER to examine all supporting data and information submitted with the offer. SELLER shall have the right to meet such competitive offer.

If, by the one hundred and eightieth day preceding the end of the contract period in which notice of price renegotiation was given, the parties have agreed upon a new Base, appropriate changes shall be made to the adjustment factors provided in Exhibit "A". The Price of coal effective at the commencement of the next contract period shall be computed from the new Base adjusted under the provisions of Exhibit "A" from the reference date of the new Base. If, by such time, the parties have not reached agreement upon a new Base and SELLER declines to meet a competitive offer submitted by BUYER pursuant to the above provisions, this Agreement shall terminate at the end of the contract period in which notice of price renegotiation was given, or at BUYER's election, at the end of the temporary continuance of deliveries as provided for in Section 7.04.

7.04 If in any such renegotiation of Base, the parties fail to reach agreement on a new Base and if SELLER declines to meet the competitive offer, and BUYER desires SELLER to continue delivering coal, then SELLER agrees to continue deliveries under the terms and conditions of this Agreement for the period of time BUYER shall designate, but not to exceed twenty-four (24) months beyond the current contract period. The Price

> to be paid for such additional coal shall be determined from a new Base equal to SELLER's last Base proposed in good faith during the negotiations, adjusted under appropriate amendments to Exhibit "A", from the reference date of the new Base.
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> 7.05 It is understood and agreed that the purpose and intent of Sections 7.01 to 7.04, inclusive, are only to provide for renegotiation of Base and Exhibit "A", and neither party shall inject into such negotiations, as a condition of agreement upon a new Price for the coal, any demand or request that other terms and conditions of this Agreement be altered.

Plaintiff's Exhibit 1.

9. The primary purpose of Article VII of the Agreement is to manage market risk. *See* Brister Testimony, Trial Transcript ("Tr.") at 657-58; Veenstra Depo. I, at 22. The reopener allows the parties to reconcile deviations in the contract price with the prevailing market price. *See* Brister Testimony, Tr. at 657-58; Veenstra Depo. II, at 140.

10. Prior to the instant dispute, PSI had never solicited competitive offers pursuant to Section 7.03.

11. Under the Modification, PSI was obligated to purchase at least 3,000,000 tons of coal annually, and Exxon was obligated to supply no more than 3,300,000 tons annually, from January 1, 1984, through December 31, 2002. *See* Agreement, Contract Modification at 2.

12. Coal is not a fungible resource. Its value to a utility depends on several defining characteristics which render any given quantity of coal unique. These include sulfur, BTU, ash and water content; ash fusion temperature; hardness; and delivery factors. *See* Veenstra Testimony, Tr. at 13-26.

13. The coal supplied by Exxon under the Agreement has come primarily from Exxon's Monterey No. 2 mine, located in Clinton County, Illinois, which is part of the Illinois coal basin.

14. On the average, coal produced at the Monterey No. 2 mine and delivered to PSI yields on combustion 6.2 pounds of sulfur dioxide per million BTU's (#SO_2/MMBTU). Coal from the Monterey No. 2 mine is considered "high sulfur coal."

15. The Clean Air Act (CAA) requires all states to formulate an implementation plan (a "SIP") for national primary and secondary ambient air quality standards. *See* 42 U.S.C. §7410.

16. In 1988, pursuant to the CAA, the State of Indiana adopted a SIP for Gibson County that restricted PSI's sulfur dioxide emissions at the Gibson generating station.

17. Beginning January 1, 1992, the Gibson SIP limited SO_2 emissions to 3.57 pounds per million BTU, and further reduces those emissions to 3.13 pounds of SO_2/MMBTU on January 1, 1994. *See* Veenstra Testimony, Tr. at 16.

18. In 1990, amendments were passed to the CAA, which further affected the ability of PSI and other electric utilities to burn high sulfur coal. The amendments progressively reduce the amount of sulfur dioxide which utilities may emit. Specifically, the CAA imposes system-wide emissions limits of 2.5 pounds of SO_2/MMBTU starting January 1, 1995, *see* 42 U.S.C.A. §7651c (West Supp. 1992), and 1.2 pounds of SO_2/MMBTU starting January 1, 2000, *see* 42 U.S.C.A. §7651d (West Supp. 1992).

19. As the cost to utilities of burning high sulfur coal has increased, the market value of high sulfur coal has decreased significantly. *See* Veenstra Testimony, Tr. at 21; Chancellor Testimony, Tr. at 264-65. Coal from the Illinois basin has not been immune from these market forces; the price of coal from the Illinois basin has dropped steadily over the last five years, especially high sulfur coal. *See* Chancellor Testimony, Tr. at 265.

20. The market for large tonnages of high sulfur coal is virtually non-existent. *See* Rawl Depo. at 157.

21. On January 7, 1991, pursuant to Section 7.03 of the

Agreement, PSI gave written notice to Exxon of its desire to renegotiate the Base as provided in Article VII. *See* Plaintiffs Exhibit 14.

22. As of May, 1991, Exxon also believed that the price that it was charging PSI for its coal was higher than what the coal would sell for on the open market. *See* Goodrich Depo. at 71.

23. Exxon made its first reopener proposal to PSI on July 17, 1991, offering an undelivered price of $20.10 per ton. Subsequent offers by Exxon proposed higher prices. On November 26, 1991, Exxon proposed an undelivered price of twenty-five dollars ($25.00) per ton. *See* Plaintiff's Exhibit 35. This offer was soon withdrawn, and on December 3, 1991, Exxon proposed a delivered price to the Gibson Station of twenty-nine dollars and sixty cents ($29.60) per ton. *See* Plaintiff's Exhibit 38.

24. On April 15, 1992, Exxon Coal and PSI agreed that: (1) their positions had become polarized, and that they had been unable to reach agreement pursuant to Section 7.03 of the Agreement; (2) PSI would submit a competitive offer along with an Exhibit "A" to Exxon Coal as early in May, 1992, as reasonably practicable; and (3) if Exxon Coal decided to meet the competitive offer, it would do so by written notification delivered to PSI no later than 5:00 p.m., Houston time, on July 3, 1992. *See* Plaintiff's Exhibit 53.

25. In a letter to PSI dated April 28, 1992, Exxon Coal presented PSI with its last offer within the meaning of Section 7.03 of the Agreement. Exxon proposed a price of $30 per ton f.o.b. Gibson Station. *See* Plaintiff's Exhibit 58. PSI did not accept Exxon Coal's offer.

26. By May 11, 1992, PSI had received offers from three coal suppliers to furnish coal under the Agreement. These offers came from the Black Beauty Coal Company, Freeman Coal Sales, and Franklin Coal Sales, *see* Veenstra Testimony, Tr. at 70-71, and called for the same quantity of coal as the Agrement, better quality, with penalties, lower price, and greater delivery

flexibility. *See* Veenstra Testimony, Tr. at 76.

27. PSI employed two mining consultants, John Sabo of Marshall Miller & Associates, and Seth Schwartz of Energy Ventures Analysis, Inc., to evaluate the offers. Mr. Sabo is a mining engineer, and Mr. Schwartz is an expert on fuel contracts and pricing.

28. In terms of the Black Beauty offer, the objective of the Marshall Miller study was "to determine if BBCC [Black Beauty Coal Company] has the resources and capability to produce the quantity and quality of coal as bid, in addition to meeting current coal supply contrary commitments." *See* Plaintiff's Exhibit 61, Marshall Miller & Associates Report, at 1. Marshall Miller concluded that "BBCC is a viable operation and has the resources and capability to provide the quantity and quality of coal as bid [to PSI] in addition to meeting its current supply contract obligations." *ID.* at 6; *see also* Sabo Testimony, Tr. at 424.

29. Mr. Schwartz's analysis of the three offers was comparative:

> In my opinion, all three offers received by PSI would qualify as "competitive offers" under Section 7.03 of the Agreement. All three offers are firm and in writing. All three suppliers are large producers with the reserves and the production capacity to perform the proposed contract. The coal quality specified in the three offers is generally equal to or superior to the quality specified in the Exxon Agreement. . . . In my opinion, considering all factors, the Black Beauty offer is the best offer for PSI, and should be submitted to Exxon as the "competitive offer".

Plaintiff's Exhibit 61, Energy Ventures Analysis Report at 2.

30. Mr. Schwartz advised PSI that Exxon's $29.60 offer was not competitive. *See* Schwartz Testimony, Tr. at 449.

31. Mr. Schwartz advised PSI that Black Beauty had the financial reserves to compensate PSI if they were to default. *See* Schwartz Testimony, Tr. at 461-2.

32. The analyses of Marshall Miller and Energy Ventures Analysis were forwarded to Exxon. *See* Veenstra Testimony, Tr. at 89.

33. Based on the opinions of Messrs. Sabo and Schwartz, on May 13, 1992, PSI timely submitted to Exxon the offer from Black Beauty Coal Company as the competitive offer called for under Section 7.03.

34. Pursuant to the parties' memo of understanding of April 15, 1992, Exxon had until July 3, 1992 to meet the competitive offer.

35. On July 1, 1992, Exxon informed PSI that, based on certain assumptions, "meeting such Black Beauty offer would require that the new "Base" (which would become effective under Section 7.01 of the Agreement on January 1, 1993) would be $23.266 per ton." *See* Plaintiff's Exhibit 77, at 2.

36. On August 13, 1992, PSI informed Exxon that in its view, "Exxon [had] declined to meet th[e] Competitive Offer" and that "PSI hereby notifies Exxon that it does not elect to receive any temporary deliveries after December 31, 1992. . . ." Defendant's Exhibit 250.

37. Black Beauty believes that it can supply the coal as described in its offer. *See* Chancellor Testimony, Tr. at 288, 325.

38. PSI has informed Black Beauty that it is willing to sign the Black Beauty offer. *See* Chancellor Testimony, Tr. at 325.

39. PSI presented the Black Beauty offer to Exxon. *See* Veenstra Testimony, Tr. at 88.

40. The cost to PSI to purchase coal furnished pursuant to the Black Beauty offer is less than what PSI would have to pay to Exxon based on its offer of $23.266 per ton. *See* Plaintiff's Exhibit 61; Veenstra Testimony, Tr. at 101-105.

41. PSI believes that the Black Beauty offer provides more value to PSI than does Exxon's offer. *See* Veenstra Testimony, Tr. at 153-54.

42. Exxon believes that Section 7.05 of the Agreement prevents extending the scope of the reopener beyond reevaluation of the Base. *See* Brister Testimony, Tr. at 710-11.

43. PSI believes that Section 7.05 is not applicable to any competitive offer submitted pursuant to Section 7.03, but instead applies strictly to the "renegotiation" between PSI and Exxon as outlined in Section 7.03. *See* Veenstra, Depo. II at 28-29.

44. The parties have differing views concerning what constitutes a "comparative offer" under Section 7.03. Exxon's position is that, with the exception of the Base, any competitive offer must have substantially the same terms as the Agreement. *See* Brister Testimony, Tr. at 717. In addition, "Exxon Coal contends that for PSI to submit a 'competitive offer' to Exxon Coal, PSI is required to provide an offer which specifies a new 'Base,' *determined on a delivered basis to PSI's Gibson Plant . . . .*" Plaintiff's Exhibit 77, at 2 (emphasis added).

45. PSI, in contrast, contends that Section 7.03 requires Exxon to match all the terms and conditions of the competitive offer, or, at a minimum, match those terms that PSI deems significant. *See* Veenstra Depo. II at 37-41. In a letter dated May 12, 1992, Mr. Veenstra informed Wendell Ellis that "[u]nless Exxon matches all the terms and conditions of this competitive offer by or before 5:00 p.m., Houston time, July 3, 1992, the Agreement by which Exxon Coal USA, Inc. supplies coal to PSI Energy will terminate under the terms of Article VII." Plaintiff's Exhibit 63.

46. Based at least in part on experience with other contracts, the parties contemplated the necessity of discussing the terms of any competitive offer and adjusting their negotiating positions accordingly. *See* Brister Testimony, Tr. at 679; Veenstra Depo. III, at 444-451; Ashley Depo. II, at 206-08.

47. The Black Beauty contract offer is based not just on cost factors, but also on intangible elements that add value to the contract, such as the *force majeure* provision. *See* Veenstra

Testimony, Tr. at 153-54. If the Black Beauty offer did not include these elements, the contract pricing scheme would be lower. *Id.* at 154.

48. The delivered price of the coal is only one of many factors that utilities consider when making their supplier selections. Other factors, such as the financial stability of the supplier, also are part of the buyer's decision calculus. *See* Hugh Rawl Depo. at 21-23.

49. Both the Preamble and Article VI of the Agreement contemplate that Exxon coal could be delivered to any of PSI's facilities. The Agreement states in pertinent part:

> WHEREAS, BUYER owns and operates an electric generation system in Indiana, and Buyer desires to secure an assured and dependable long-term supply of coal suitable for use in its existing and planned power generating stations; . . . ."

Plaintiff's Exhibit 1, at 1.

> 6.01 Coal shall be delivered to BUYER by SELLER F.O.B. BUYER's Gibson Power Plant, *or other points in Indiana which BUYER designates*, in railroad cars in unit trains and shall be transported at SELLER's expense. (Emphasis added).

Plaintiff's Exhibit 1, at 8. Although not a requirement of the Agreement, the Gibson Power Plant had been the exclusive recipient of coal from the Monterey No. 2 mine.

50. PSI operates power generating stations at several locations throughout Indiana. The Black Beauty offer provides for delivery of coal f.o.b. destination to any of these stations. *See* Plaintiff's Exhibit 61. PSI and Black Beauty anticipate that Black Beauty's coal will be delivered only to the Gibson, Wabash, and Cayuga power stations.

51. PSI negotiated with Exxon in good faith during 1991 and 1992.

52. Any finding of fact which is actually a conclusion of law

shall be treated as a conclusion of law and incorporated into the conclusions of law which follow.

Conclusions of Law

1. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1332(a)(1).

2. The Court has personal jurisdiction over the parties.

3. Pursuant to 28 U.S.C. 1391(a), venue in this action is proper in the Southern District of Indiana.

4. Pursuant to the Federal Declaratory Judgment Act, as codified, the Court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." 28 U.S.C. §2201.

5. By its own terms, the Agreement is to be interpreted in accordance with the laws of the State of Indiana.

6. In construing contractual language, the court's primary purpose is to discover the mutual intention of the parties at the time the contract was made. *See Western and Southern Life Ins. Co. v. Vale*, 12 N.E.2d 350 (Ind. 1938); *Shahan v. Brinegar*, 390 N.E.2d 1036, 1041 (Ind.App. 1 Dist. 1979).

7. When contractual language is unambiguous, absent reasons to rescind the contract, the court must not look beyond that language to discover the parties' intent. *See Bland v. Atlas Van Lines, Inc.*, 761 F. Supp. 82, 86 (S.D. Ind. 1989); *Lewis v. Burke*, 226 N.E.2d 332, 337 (Ind. 1967).

8. Under Indiana law the test for determining whether a contract is ambiguous is whether reasonable persons would find the contract subject to more than one interpretation. *See Williams v. National Can Corp.*, 603 F.Supp. 1268, 1275 (N.D. Ind. 1985); *Fort Wayne Cablevision v. Indiana & Michigan Electric Co.*, 443 N.E.2d 863, 866 (Ind.App. 3 Dist. 1983).

9. Whether contractual terms are ambiguous is a question of law determined by the court. *See Piskorowski v. Shell Oil Co.*, 403 N.E.2d 838, 844 (Ind.App. 3 Dist. 1980).

10. Under the Indiana Uniform Commercial Code, an agreement may be found not only from language, but also "by implication from other circumstances including course of dealing or usage of trade or course of performance. . . ." Ind. Code §26-1-201(3) (Burns Supp. 1992). This section is inapplicable to the instant action, however, because there was no course of dealing or performance between these parties as concerns the reopener provision, given that PSI had never submitted competitive offers under Section 7.03. There also was no evidence presented that was sufficient to establish a particular usage of trade.

11. Article VII of the Agreement is not ambiguous.

12. Section 7.01 defines the "Base" as "The Price of coal delivered hereunder. . . .", meaning the base for coal supplied by Exxon to PSI pursuant to the Agreement.

13. Section 7.03 addresses three distinct activities: (1) the parties' renegotiation of the Base, (2) PSI's presentation of a competitive offer, and (3) Exxon's analysis of the competitive offer and its presentation to PSI of an offer that meets the competitive offer. The language of Section 7.03 indicates that these activities are to occur sequentially. Once the renegotiation of the Base fails, PSI has the right to present Exxon with a competitive offer. Once PSI has presented Exxon with a competitive offer, Exxon may then analyze the competitive offer and exercise its right to meet the competitive offer.

14. Section 7.05 states that "the purpose and intent of Sections 7.01 to 7.04, inclusive, are only to provide for renegotiation of Base and Exhibit 'A'." Given that Section 7.01 defines the "Base" exclusively in terms of the PSI-Exxon Agreement (*i.e.* "The Price of coal delivered *hereunder*. . . ." meaning pursuant to the Agreement (emphasis added)), Section 7.05 is a limitation only on negotiations between Exxon

and PSI. Section 7.05 places no restriction on the form of the competitive offer contemplated in Section 7.03 because the source of the competitive offer is an entity other than Exxon. If the parties had intended the meaning that Exxon urges on the Court, they would not have used the proper noun "Base" in Section 7.05. The language is not ambiguous, "Base" with a capital "B" means the Exxon-PSI base.

15. Exxon's interpretation of Section 7.05 and its application to Section 7.03 is unreasonable as a matter of law. Exxon believes that, with the sole exception of the base, Section 7.05 requires the competitive offer to mirror the remainder of the Agreement. Therefore, in Exxon's view, any competitive offer that incorporates non-base terms that differ materially from the Agreement's terms could not be a competitive offer under Section 7.03. The Court finds no justification for such a reading.

The evidence presented establishes that any given coal supplier occupies a unique market position. The competitive advantage it possesses depends on such factors as the quality of the coal it can produce, the distance that the coal must travel to the buyer, the nature of its mining operations, and other idosyncratic variables. Not every competitive advantage, though, derives from efficiencies in the cost of production because other considerations besides cost enter into the decision calculus for the buyer. For example, the supplier's flexibility in scheduling and delivering the coal is also an important competitive dimension. *See* Masselink Depo. III, at 249. The point seems too obvious to warrant much discussion, but whether a coal buyer enters into a contract with a particular supplier depends on the totality of circumstances surrounding the contract and the overall value that it renders to the buyer. Thus, it is not impossible for a coal supplier which is situated at a farther distance from the buyer than a competitor, with an inferior quality coal, to prevail in his negotiations with the buyer by offering non-cost related concessions that offset whether disadvantages he may face.

Exxon's reading of the Agreement would foreclose any competition on non-base terms. Such a reading not only is inconsistent with the overriding purpose of Article VII, it also directly contradicts its express language. Article VII was included in the Agreement primarily to manage market risks. Exxon's interpretation, if adopted, would shift far too much risk onto PSI by creating a barrier to competition that few coal supplier (*i.e.* third party competitors) could overcome. The Court can find no language in the Agreement that would warrant impeding market competition in this way.

Exxon's interpretation also betrays the parties' original intent as manifested in the words they chose to incorporate in the Agreement; "competitive", as that term is used in "competitive offer", means nothing less than fully competitive. Exxon's own reasoning supports this finding:

> [a]s a practical matter neither Exxon nor any other seller could meet literally all the terms and conditions of the Black Beauty offer. *That offer contains many idiosyncratic features tailored to the unique circumstances of Black Beauty's proposed operations.* Explicit reference is made to production at and sales from each of Black Beauty's three mines, by name; different coal quality standards for each mine; different "starting prices" are quoted for each mine; and delivered prices are calculated by adding to those "starting prices" the actual transportation costs incurred on each shipment from those mines.

Defendants' Trial Brief, at 32-33 (emphasis added).

The adage, "what is good for the goose is good for the gander," applies here. Exxon is just as uniquely situated in the market as Black Beauty. Why should the Court require Black Beauty to do what Exxon correctly implies is impossible: mirror all the terms of another coal suppliers' agreement and compete just on one term, the base? Simply put, the contract does not indicate that the parties intended that the third-party competitor would have to develop its offer shackled by the limitations that Exxon now seeks to impose. Under the Agree-

ment, PSI had the right to obtain a competitive offer from another supplier which contained terms and conditions which were different from the terms and conditions of the Agreement.

16. The Black Beauty offer submitted to Exxon on May 13, 1992, is a "competitive offer" under the Agreement.

17. Pursuant to the Agreement, a "competitive offer" is: (1) "a firm, written offer received by PSI from a supplier", (2) "which [PSI] is willing to accept," (3) "for the supply of coal called for under the remaining term of this Agreement." Agreement, Section 7.03. These elements have been satisfied. *See* Plaintiff's Exhibit 61; Veenstra Testimony, Tr. at 88.

18. Exxon argues that Black Beauty's offer is not a "competitive offer" because neither the transportation costs nor the precise tonnages to be delivered from each of Black Beauty's three mines to PSI's stations are certain, thereby making it impossible to calculate a single base that Exxon can "meet." As already explained, an important competitive dimension is the flexibility that a supplier can offer to a buyer. Simply because Exxon typically supplied coal from one mine to one station is no reason to force third-party competitors to enter into the same supply configuration. No two coal suppliers occupy precisely the same market position. Black Beauty's operations allow it to supply coal to PSI's stations from more than one mine, providing those two parties additional leeway in settling on an optimal allocation of coal. What this distribution will be depends of course on a variety of factors, many of which cannot be specified at present. Circumstances, such as trucking rates and mining operations, change. The Court can find no justification to require Black Beauty to compete on terms that, although perhaps well-suited to Exxon's situation, do not optimize its own position. As Black Beauty's President and Chief Executive Officer, Steven E. Chancellor, explained, Black Beauty's "goal obviously was to put the best offer on the table that we could put together. Take full advantage of everything we had to work with. . ." Chancellor Testimony, Tr. at 271. That is the nature

of competition in a free enterprise system. The Court will not read into the Agreement restrictions that impede the orderly function of the market mechanism, as Exxon's peculiar interpretation would require.

19. Exxon's arguments as concern the lack of a single base figure in the Black Beauty offer are consistent with its misinterpretation of what it must do to "meet" the competitive offer under the Agreement. Exxon believes that if it knew exactly how Black Beauty and PSI were going distribute the coal and what the attendant costs would be (*e.g.*, transportation)[2], it then could develop a new Base figure—the only significant competitive dimension in Exxon's view. But this view misconstrues the nature of the Black Beauty offer, which is founded on more than rote calculations involving quantifiable costs. Part of PSI's compensation to Black Beauty under the competitive offer is in return for the inclusion of certain intangible benefits, such as termination rights. If the Black Beauty offer did not contain these terms, its compensation from PSI would likely be lower. *See* Veenstra Testimony, Tr. at 153-54. The implication for Exxon is twofold. First, the fact that the Black Beauty offer contains certain unspecified cost considerations is of no consequence because the offer is based in part on factors that are not subject to objective evaluation, and second, meeting the competitive offer pursuant to Section 7.03 includes

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[2] The Court cannot help but look with some suspicion upon Exxon's argument that it is dumbfounded as to the parameters of the Black Beauty offer. Exxon's predicament does not appear dissimilar to the kind of problem that well-managed businesses regularly and successfully confront: how to allocate a scarce resource within constraints that may or may not be precisely known. It strikes this Court that any decent linear programmer should be able to estimate the way in which PSI is likely to allocate optimally the coal from Black Beauty's mines, given such constraints as the nature of the coal at each mine, and the tonnages that can be burned at each PSI station with the specified SO_2 limits. *See, e.g.*, David R. Anderson, Dennis J. Sweeney, and Thomas A. Williams, Quantitative Methods for Business Analysis (4th ed. 1989). The only offer that Exxon appears willing to examine pursuant to Section 7.03 is one which has every cost, including future costs, precisely identified. The Court will not endorse such a rigid and unrealistic interpretation of that section.

more than merely matching the competitive offer's base, assuming naturally that the third-party competitor would seek to take full advantage of its own market position and compete along more than the base dimension.

20. Pursuant to Section 7.05, Exxon need not modify anything but the Base to "meet" the competitive offer. PSI's interpretation of Section 7.03 that Exxon must match the competitive offer term for term and in kind is incorrect, as this would be contrary to the express meaning of Section 7.05. That Section states that "the purpose and intent of Sections 7.01 to 7.04, inclusive, are only to provide for renegotiation of Base and Exhibit 'A', and neither party shall inject into such negotiations, as a condition of agreement upon a new Price for the coal, any demand or request that other terms and conditions of this Agreement be altered." Because the competitive offer is not limited to base competition, as this is the only interpretation that would allow the third party competitor to bring the full range of its resources to bear in the marketplace, the meaning of Section 7.03 that Exxon "shall have the right to meet such competitive offer" means that it must be allowed to match the overall value that the competitive offer would confer on PSI. If it chose not to enter into negotiations outside of Article VII, Section 7.03 allows Exxon to offset non-base related concessions in the competitive offer with corresponding reductions in the Base.

21. Nothing in the language of Section 7.03 indicates that Exxon had the right to determine unilaterally whether it had met the competitive offer; based in part from experience with other reopener provisions, the parties recognized the necessity of discussing the competitive offer and making adjustments in their negotiating positions accordingly. *See* Brister Testimony, Tr. at 679; Veenstra Depo. III, at 444-451; Ashley Depo. II, at 206-08.

22. PSI has satisfied Section 7.03's requirement that it furnish Exxon with "documentary proof" of the competitive offer, and "to examine all supporting data and information

submitted with the offer." PSI furnished a copy of the Black Beauty offer to Exxon. *See* Veenstra Testimony, Tr. at 88. PSI also gave Exxon copies of the consulting reports that it solicited to verify Black Beauty's ability to fulfill the requirements of its offer. *See* Veenstra Testimony, Tr. at 89.

Exxon contends that it has not been able to substantiate Black Beauty's ability to perform because it has not been given the precise details of Black Beauty's mining operations. Exxon's argument is unreasonable because it contemplates that Section 7.03 can be used to access proprietary information from Exxon's competitors—in this instance Black Beauty. The Court will read the Agreement in a way that renders it reasonable rather than unreasonable. *See, e.g., South Bend v. Blue Lines, Inc.*, 38 N.E.2d 573, 575 (Ind. 1942). Section 7.03 is not a license to conduct industrial espionage. The language in question instead is designed to prevent PSI from soliciting sham offers and using the reopener as a means to escape from the Agreement. The competitive offer must be one that Exxon "is willing to accept", and the documentation that Exxon is entitled to must afford it the opportunity to verify that the competitive offer is one that PSI reasonably could be expected to accept. The Black Beauty offer, and the reports of the consultants that PSI engaged to evaluate it, *supra*, were sufficient to meet the documentation requirements of Section 7.03.

23. Section 7.03 of the Agreement gives Exxon the right to meet the competitive offer.

24. Exxon has not met the Black Beauty offer. The cost to PSI to purchase coal furnished pursuant to the Black Beauty offer is less than the Exxon offer of $23.266 per ton. *See* Plaintiff's Exhibit 61; Veenstra Testimony, Tr. at 101-105. This comparison is independent of the additional flexibility which the Black Beauty offer affords to PSI, (*see, e.g.*, price renegotiation, force majeure, performance limitations, and termination rights provisions), which further highlights the failings in Exxon's bid.

25. The Agreement shall terminate on December 31, 1992, or at PSI's election, at the end of the temporary continuance of deliveries as provided for in Section 7.04.

CONCLUSION

For the foregoing reasons, the Court GRANTS the Plaintiff's request for a declaratory judgment that: (1) the written offer which PSI Energy Inc. has received from the Black Beauty Coal Company is a competitive offer within the meaning of the Agreement; (2) Exxon did not meet the competitive offer submitted to it, on or before 5:00 p.m., Houston time, July 3, 1992; and (3) the Agreement shall terminate on December 31, 1992, or at PSI's election, at the end of the temporary continuance of deliveries as provided for in Section 7.04 of the Agreement.

It is so ORDERED this 28th day of December, 1992.

/s/ Sarah Evans Barker

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PSI ENERGY, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	IP 92-645-C
	)	
EXXON COAL USA, INC., and	)	
EXXON CORPORATION through	)	
its Division EXXON COAL AND	)	
MINERALS COMPANY,	)	
Defendants.	)	

JUDGMENT

In accord with the Court's Entry in the above named action, the Court hereby declares that: (1) the written offer which PSI Energy Inc. has received from the Black Beauty Coal Company is a competitive offer within the meaning of the Agreement; (2) Exxon did not meet the competitive offer submitted to it, on or before 5:00 p.m., Houston time, July 3, 1992; and (3) the Agreement shall terminate on December 31, 1992, or at PSI's election, at the end of the temporary continuance of deliveries as provided for in Section 7.04 of the Agreement.

It is so ORDERED this 28th day of December, 1992.

/s/ Sarah Evans Barker

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MR. BURGOYNE: Objection, your Honor. I don't belief he knows what Exxon's state of mind was at the time it made those bids.

THE COURT: Would you repeat the question, please?

MR. DAVIS: I will, your Honor.

BY MR. DAVIS:

Q. Mr. Schwartz, did the Exxon bids to the City of Springfield and Commonwealth Edison reflect the price for that coal at that time?

THE COURT: You may answer. The objection is over-ruled; he may answer as to his understanding.

A. Yes. Exxon's offers were in line with market prices, although they were still slightly too high to successful winning bids. The actual market was somewhat lower than what they offered, but still they were quite close.

BY MR. DAVIS:

Q. Have you reviewed, sir, any Exxon documents indicating that Exxon was aware of the market price of its coal during the '91-'92 time period?

A. Yes, I have.

Q. Mr. Schwartz, have you reviewed Plaintiff's Exhibit 205, sir? I am specifically referring to a chart entitled Price of Major Term Coal Supply attached thereto.

A. Yes, I have.

Q. Mr. Schwartz, does that chart attached to Plaintiff's Exhibit 25 accurately reflect the market price for Monterey 2 coal in March of 1992?

A. No, it doesn't.

Q. Would you explain briefly to the court what that chart reflects, and why it does not reflect the market price?

A. There are four major flaws to this chart as to why it does not

reflect the market price for Monterey's coal.

Probably the first and foremost is that it showed the delivered prices of the existing contracts at the time without regard to the date of those contracts and when the price was set. As a result, these delivered prices do not reflect the current market price at the time that it was offered, but rather reflect the market price over a variety of periods of time, including many high priced old contracts just like Exxon's old contract with PSI.

Secondly, the presentation of data on this exhibit is selective and biased. The exhibit excludes many other long-term contracts for the same coal as described under this exhibit that had lower prices that were not included in this analysis.

Thirdly, the exhibit is not selective as to the coal quality at issue here. Specifically, numerous contracts on this exhibit are for low-sulfur coal, which carries a much higher market price than the coal called for under the Monterey contract.

And fourth and finally, the prices shown here are delivered prices to a wide variety of utilities and power plants, including many with much higher transportation costs than would be appropriate for the delivered price analysis to the Gibson power plant, and as a result it's a false presentation of what an average delivered price would be to the Gibson power plant in these contracts.

Q. In your opinion, Mr. Schwartz, would it be honest for a coal seller to represent that Exhibit 205 accurately represents the market price for Monterey coal in March of 1992?

MR. BURGOYNE: Objection, your Honor. There is no testimony as to any representations by Exxon in that meeting. Nor is this witness in a position to make a determination on Exxon's honesty.

THE COURT: Sustained.

MR. DAVIS: Your Honor, if I might, number one, I would represent to the court that Mr. Veenstra, who will follow Mr.

Schwartz, will lay that foundation; in the interest of time we're doing it this way.

Second, the question as asked did not ask about Exxon; it asked about whether any seller made that representation.

THE COURT: Well, then work that into your premise of your question, if those representations were made and so forth and so on.

BY MR. DAVIS:

Q. Mr. Schwartz, if a coal — I'll ask you to assume that a coal seller represented to a buyer during renegotiations in March of 1992 that Exhibit 205 accurately represented the market price for Monterey 2 coal; would that be an honest representation?

A. No, it would not.

Q. Mr. Schwartz, what type of offer is contemplated during the renegotiations under Article 7?

A. An offer given in good faith to reach an agreement under — as to a new price under the contract.

Q. And in what range would you expect an agreement on price to be reached?

A. I would expect an agreement to be reached at a range reflecting the current market price at the time.

Q. Mr. Schwartz, did the thirty dollar delivered price given to PSI by Exxon in April of 1992, was that a market based price?

A. No, it was not.

Q. What, sir, was the approximate difference in Exxon's offer and the market at the time?

A. About seven dollars per ton over the market at the time.

Q. To your understanding, Mr. Schwartz, how did Exxon attempt to justify this seven-dollar difference?

A. Based on my review of the documents and my understanding, Exxon's justification was that its offer included an upward

EDITOR'S NOTE:

THIS BOOK WAS INCOMPLETE AT TIME OF FILMING, AS IT ENDS IN MID-SENTENCE. IF AND WHEN A COMPLETED COPY CAN BE OBTAINED WE WILL RE-ISSUE A NEW MICROFICHE AT THAT TIME.